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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IMMUNO, A.G.,

Petitioner,

vs.

JAN MOOR-JANKOWSKI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Questions Presented

1. Is an expression of opinion protected by the First Amendment to the United States Constitution, where the published factual predicate is capable of being proved false?

2. Where a published expression of opinion is based upon a published factual predicate, and there is evidence upon which the predicate could be found false, does the First Amendment to the United States Constitution require that the court determine the issue of truth or falsity before trial?

3. Does a Letter to the Editor occupy a "defamation-free zone," under the First Amendment to the United States Constitution?

Parties to the Proceeding

Petitioner is Immuno, AG,[1] an Austrian manufacturer of lifesaving vaccines, and products derived from blood. Many of the products must, by law, be tested on chimpanzees.

Respondent is Jan Moor-Jankowski, contract primatologist, competitor of Immuno for the limited supply of chimpanzees, and Editor in Chief of the *Journal of Medical Primatology*—a journal published, *inter alia*, to promote Moor-Jankowski's commercial interests as director of a primate laboratory dependent for its existence upon corporate testing contracts.

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[1] *Parent:* Immuno International, AG. *Subsidiary:* Osterreichisches Institut fur Haemoderivate GmbH. *Affiliates:* Immuno S.A.C.I.F.I.A., Immuno S.A., Immuno (Canada) Ltd., Immuno Denmark APS, Immuno GmbH, Immuno France S.A.R.L., Immuno Ltd., Immuno S.p.A., Instituto de Hemoderivados Immuno S.A., Immuno Sweden AB, Immuno-U.S., Inc.

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In the Supreme Court of the United States

October Term, 1989

IMMUNO, A.G.,

Petitioner,

vs.

J. MOOR-JANKOWSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
for the State of New York

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, New York County, denying defendant-respondent Moor-Jankowski's motion for summary judgment is unreported (other than at 14 Med. L. Rptr. 1821 (S. Ct., N.Y. County 1987)), and is set forth in the Appendix at p. 15. The decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, reversing the

New York, First Judicial Department, reversing the determination of the Supreme Court and dismissing the complaint, is set forth in the Appendix at p. 31; that decision is reported at 145 A.D.2d 114, 537 N.Y.S.2d 129 (1st Dep't 1989).

The order of the Court of Appeals of New York granting plaintiff-petitioner Immuno, AG's application for leave to appeal is set forth in the Appendix at p. 71, and is reported at 74 N.Y.2d 602, 541 N.Y.S.2d 985, 539 N.E.2d 1113 (1989). The decision of the Court of Appeals affirming the decision of the Appellate Division is set forth in the Appendix at p. 1, and is reported at 74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129 (1989). The order of the Court of Appeals denying Immuno's motion for reargument is set forth in the Appendix at p. 72, and at this writing is unreported.

JURISDICTION

1. On February 15, 1990, the Court of Appeals of New York denied Immuno's motion for leave to reargue that Court's decision. That constitutes the final order of the Court of Appeals of New York with respect to this case.

2. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C. § 1257(3) (1988).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in part:

"Congress shall make no law. . .abridging the

freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

"No State shall. . .deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

The Facts

Moor-Jankowski is both the editor of the *Journal of Medical Primatology* and the director of LEMSIP, a primate laboratory which utilizes chimpanzees in biomedical research and testing for industry. Immuno manufactures lifesaving plasma derivatives and vaccines that, by law, are tested on chimpanzees for safety and efficacy. Immuno has successfully conducted pre-clinical trials of an AIDS vaccine on chimpanzees pursuant to a collaborative research and development agreement among its U. S. affiliate, the National Cancer Institute, and the National Institute for Allergies and Infectious Diseases.

For years Immuno had contracted chimpanzee protocols to LEMSIP. Before the libel, Immuno grew dissatisfied with LEMSIP, and withdrew its protocols and its chimpanzees. Around the same time, Immuno started exploring the possibility of establishing a chimpanzee captive-breeding and testing facility in Sierra Leone. Moor-Jankowski suggested to Immuno that it enter into such a project with Dr. Franz Sitter, a zoologist and parasitologist living in Sierra Leone. Moor-Jankowski had years of first-hand experience with Dr. Sitter and knew he obtained chimpanzees without employing destructive methods.

After Immuno withdrew its chimpanzees from LEMSIP, Moor-Jankowski incited Shirley McGreal, an animal rights activist, to send him a Letter to the Editor (which Moor-Jankowski partly wrote for her). The letter proclaimed that Immuno's Sierra Leone project would turn the chimpanzees of West Africa into a reservoir of hepatitis. The core premise was the factual statement that it was impossible to tell whether a chimpanzee which had been exposed to Non-A, Non-B hepatitis was infectious—which statement Moor-Jankowski conceded, in depositions, he knew to be false.[2] (*See* Appendix at 95; *see also* Appendix, pp. 88 (first full paragraph), 89.)

Moor-Jankowski printed that letter nearly a year after he received the first draft. He gave it the imprimatur of his own Editorial Note, vouching for it and for McGreal. In the interim, he deliberately ignored conflicting evidence that McGreal herself realized disproved some of her accusations. The Editorial Note and Letter to the Editor are reproduced in the Appendix at p. 97.

Immuno did see an early version of the letter. Immuno told Moor-Jankowski the letter was wholly inaccurate, and told Moor-Jankowski (in his role as

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[2]The minor premise of the accusation was that Immuno would release exposed chimpanzees into the wild, a fact Moor-Jankowski knew to be false prior to publication. The libel letter and an interview Moor-Jankowski gave to the *New Scientist* magazine (also a subject of this case) contained a host of other untrue and defamatory statements, which Immuno will develop on full brief if certiorari is granted. Perhaps the most striking false charge was that Immuno would kill large numbers of mother chimpanzees to obtain a single juvenile suitable for testing—when Moor-Jankowski knew Sitter did *not* use such methods and that Immuno would be using only Sitter to obtain chimpanzees.

editor) to consult with himself (in his role as LEMSIP scientist) as to the letter's erroneous scientific premises. Moor-Jankowski omitted that fact and others from the Editorial Note (Appendix at 97).

There is ample record evidence that Moor-Jankowski's motive was to discredit Immuno's plans to do its own testing (thus forcing Immuno to resume using his services at LEMSIP), and to keep McGreal and other animal rights activists from interfering with his own operation by focusing their attention on Immuno.

The Proceedings

On December 14, 1984 Immuno served its complaint for libel against Moor-Jankowski (and others no longer in the case) in the Supreme Court of New York, New York County. Moor-Jankowski moved for summary judgment on September 5, 1986. The court denied that motion by order entered August 17, 1987. *See Immuno, A.G. v. Moor-Jankowski*, 14 Med. L. Rptr. 1821 (S. Ct., N.Y. County 1987), set forth in the Appendix at p. 15.

Moor-Jankowski appealed that decision to the Appellate Division, First Department. That court reversed the motion court by order entered January 17, 1989, on the ground that the statements in question were either protected opinion or factually true. *Immuno, A.G. v. Moor-Jankowski*, 145 A.D.2d 114, 537 N.Y.S.2d 129 (1st Dep't 1989). Immuno then moved the Court of Appeals for permission to appeal. Permission was granted May 9, 1989. *Immuno, A.G. v. Moor-Jankowski*, 74 N.Y.2d 602, 541 N.Y.S.2d 985, 539 N.E.2d 1113 (1989).

The Court of Appeals heard oral argument on

November 14, 1989. In that argument, it was conceded by Moor-Jankowski's counsel that the premise for Moor-Jankowski's core libel—that it could not be determined whether a chimpanzee exposed to Non-A, Non-B hepatitis was infectious—was a statement of fact. Moor-Jankowski had himself already conceded that it was false. *See* Appendix at 89 (statement of fact); Appendix, pp. 88 (first full paragraph), 95 (false). Nonetheless, the Court of Appeals affirmed the Appellate Division's decision on December 14, 1989 by resolving the key issue of fact in the case contrary to Moor-Jankowski's own sworn testimony.

The Court of Appeals based its decision on the ground that the statements in question were (1) either protected opinion or factually true, and (2) immune from libel because they were made in a Letter to the Editor. *Immuno, A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 559, 549 N.Y.S.2d 938, 549 N.E.2d 129 (1989). The Court of Appeals thus approved the Appellate Division, which on a motion for summary judgment had gone beyond identifying factual issues to resolving them, on the ground that the First Amendment so required. Commentators are already claiming that decision establishes a "defamation-free zone" for letters to the editor. Immuno believes such an interpretation of what the First Amendment requires goes far beyond the intended scope of this Court's prior decisions; that it amounts to a holding that the First Amendment is too fragile ever to be entrusted to a jury's care. Immuno believes it to be vital that this Court stop a judicial trend toward actively foreclosing jury trials in libel cases.

Immuno applied for leave to reargue on January 12, 1990, on the ground that although the Court of Appeals had said Moor-Jankowski would not be protected if he had deliberately incited the libel

(Appendix at 12), it overlooked the fact that he had indeed done so. The motion to reargue was denied without opinion on February 15, 1990 (set forth in the Appendix at p. 72; unreported at this writing).

Immuno now petitions this Court for a writ of certiorari to decide definitively constitutional questions of increasingly broad importance:[3]

(1) Is an expression of opinion entitled to constitutional protection, where the published factual predicate is capable of being proved false?

(2) Where a published expression of opinion is based upon a published factual predicate, and there is evidence upon which the predicate could be found false, should the court before trial determine the issue of truth or falsity?

(3) Does a Letter to the Editor occupy a "defamation-free zone"?

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[3]In briefs at every stage and before every court below, Immuno argued every federal question raised in this petition.

REASONS FOR GRANTING CERTIORARI

I. THE NEW YORK COURT OF APPEALS HAS CONFERRED AN ABSOLUTE CONSTITUTIONAL PRIVILEGE ON A MIXED-OPINION PUBLICATION WHERE THE EVIDENCE WAS CAPABLE OF SUPPORTING A FINDING THAT THE FACTUAL PREDICATE WAS FALSE.

(a) This petition should be granted for companion consideration with *Milkovich v. The Lorain Journal Co.*

Since this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), statements of pure opinion have been held exempt from defamation actions.

Courts have spent much time and ingenuity in deciding whether particular statements *are* fact or opinion. For defendants, it has become the preferred defense when all else fails. Franklin, *Libel and Letters to the Editor: Toward an Open Forum*, 57 U. COLO. L. REV. 651, 658 (1986). This Court has decided to clarify the fact/opinion distinction, having granted certiorari in *Milkovich v. The Lorain Journal Co.*, No. 89-645 (argued April 24, 1990). That case represents the Court's first direct consideration of the opinion doctrine. Immuno's case is an opportunity to examine crucial aspects of the opinion doctrine not presented by *Milkovich*, and which if not decided will leave very important questions of mixed opinion unresolved.

Milkovich does pose questions the answers to which could affect the outcome of this case. Accordingly, it is requested in the alternative, if companion consideration is not granted, that this petition not be ruled

upon until *Milkovich* is decided. Similarly, it may be appropriate after a decision is rendered in *Milkovich* that this Court remand this case for disposition in accordance with that decision.

(b) This Court should clarify the law as to mixed opinion.

Milkovich does not directly encompass the question of statements mixing fact and opinion together. This case is thus a natural corollary, ready for resolution with *Milkovich*. The factual premise for the core libel that Immuno would spread disease by releasing chimpanzees was set forth in the Libel Letter.

> "*there is no way to determine that an animal is definitely not a carrier of the disease.*"

Immediately thereafter, the Libel Letter went on to say,

> "should release of carrier animals occur, hepatitis could well spread among wild chimpanzees over large parts of Africa. Thus chimpanzees could well become a reservoir for hepatitis just as bats are a reservoir for rabies."

Appendix at 100. *See also* Tr. Oral Arg., Appendix, pp. 74-77.

Moor-Jankowski conceded from the very start that at all times he knew the core libel was false. He testified that the premise for the core libel, that it could not be determined whether a chimpanzee exposed to Non-A, Non-B hepatitis was infectious, was

false. *See* Appendix at 95.[4] Nonetheless, the Court of Appeals affirmed the Appellate Division's decision, partly on the ground that the statements Moor-Jankowski published were factually true or protected as pure opinion. *Immuno, A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129 (1989). The New York Court of Appeals failed to hold the statements at bar actionable as "mixed opinion," by which Immuno means that the immunity afforded the expression of opinion should obtain only when the facts supporting the opinion are set forth and are true. The purpose of such a requirement is to ensure that the reader (especially the reader of a scientific journal) has the opportunity to assess the basis upon which the opinion was reached in order to draw his own conclusions concerning its validity.

The "mixed opinion" doctrine has been adopted by all federal and state courts. *See, e.g., Cianci v. New Times Pub. Co.*, 639 F.2d 54 (2d Cir. 1980); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970 (3d Cir. 1985), *cert. denied*, 474 U.S. 843, 106 S. Ct. 131, 88 L. Ed. 2d 107 (1985); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982); *Silsdorf v. Levine*, 59 N.Y.2d 8, 462 N.Y.S.2d 822, 449 N.E.2d 716, *cert. denied*, 464 U.S. 831, 104 S. Ct. 109, 78 L. Ed. 2d 111 (1983). The

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[4]Moor-Jankowski described the test used to determine if a chimpanzee is infectious in detail, and said that he himself released from his lab chimpanzees exposed to Non-A, Non-B hepatitis, because he was able to determine they were not infectious (*i.e.*, they were not carriers able to spread hepatitis). The Appellate Division, affirmed by the Court of Appeals, ignored Moor-Jankowski's crucial admission that such a test existed, and instead alluded to another primatologist's assertion that such a test was impractical.

Court of Appeals' decision directly raises the issue of whether the truth or falsity of the predicate facts in a mixed opinion case should be determined by the court even where there is evidence on which their falsity could be found. Any opinions expressed in the letter were based upon falsified or omitted underlying facts.[5]

The Journal's readers had no opportunity to assess fairly the contents of the Libel Letter. They were primatologists and certainly not hepatitis experts. One hepatitis expert who did read the letter, Dr. Alfred Prince, clearly saw it as a letter making factual statements, and he addressed specific factual statements which were indeed false. *See* Tr. Oral Arg., Appendix at 82; Prince Letter, Appendix at 103. Not being experts, the *Journal*'s readers would believe Moor-Jankowski's core falsehood—that you could not tell whether a chimpanzee was infectious—attributed to McGreal, particularly when Moor-Jankowski falsely accredited her as a medical doctor. Appendix at 33, n. 1.

The "opinion defense" is highly recommended by the media defense bar as a vehicle for avoiding liability (Franklin, *Libel and Letters to the Editor: Toward an Open Forum*, 57 U. COLO. L. REV. 651, 658 (1986)) and its use is widespread. *See, e.g.,* McCrory, Bernius, Jones and Montero, *Constitutional Privilege in Libel Law,* in 1 COMMUNICATIONS LAW 1989 (PLI),

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[5]Although in Immuno's case the mixed opinion was founded on an *express* false factual predicate, by far the larger number of mixed opinion cases concern the type mentioned by the RESTATEMENT (SECOND) OF TORTS § 566: where a defamatory opinion carried the *implication* that the defamer knows facts which, if the reader knew them, would bear him out. The issues Immuno asks this Court to decide affect *both* kinds of mixed opinion.

403, 419-57. That defense *must* be clarified where there is mixed opinion founded on a factual falsehood. The scope of the analysis must be appropriate to prevent the increased likelihood of reputational injury that results when readers assess opinions that appear to be based on fact.

The Court of Appeals did not apply the teachings of the mixed opinion cases because it ignored Moor-Jankowski's testimony that, when the letter was published, he knew how to tell whether a chimpanzee was infectious. Anomalously, however, that court did concede that if the core libel were false, it would be actionable. Appendix at 10.

It may be that after *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), because the libel plaintiff now has the burden of proving falsity, the distinction between opinion and factual statements becomes irrelevant. By hypothesis an opinion cannot be proven true or false, so the plaintiff will necessarily fail to carry his burden. By that standard, a statement of opinion which is, however, founded on "facts" set forth to support the opinion, and which are false, is actionable because its foundation can be proven true or false. That mixed opinion should be actionable is as it should be, because defamatory statements of opinion founded on "false facts" are just as damaging to reputation as purely factual statements.

Thus, it is clear that the two New York Appellate Courts failed to recognize the "subtle and difficult" nature of the issue before them, which Chief Justice Rehnquist pointed to in *Ollman*, 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985). By this failure, the New York Appellate Courts, in this case which has

attracted wide-ranging interest in the media,[6] have used summary judgment to eviscerate the role of the jury. They have created a "defamation-free zone" that anyone can easily enter by couching the libel in the form of a letter to the editor. They have done this despite the admission by Moor-Jankowski's counsel that the libel at bar was factual.

When Moor-Jankowski's counsel argued before the New York Court of Appeals, Judge Hancock asked how it could be opinion to say it was impossible to tell whether a chimpanzee exposed to Non-A, Non-B hepatitis was or was not a carrier of the disease. Counsel for Moor-Jankowski conceded that it was a factual statement, capable of being proven right or wrong. Tr. Oral Arg., Appendix at 89.

These issues should be addressed to provide the direction required to balance the delicate constitutional issues of free speech versus the protection of one's reputation within the bounds of the substantive law of libel by way of a trial by jury.

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[6]*See, e.g.*, Hentoff, *Keeping Letters to the Editor Out of Court*, Village Voice, Feb. 20, 1990 at 22; Hentoff, *A Very Expensive Letter to the Editor*, Village Voice, Feb. 13, 1990, at 24; Hentoff, *'A Special Type of Expression—A Letter to the Editor'*, Washington Post, Jan. 13, 1990; Green, *Suit over Research Criticism Ended*, Charleston News & Courier, Dec. 19, 1989; *High Court Bars Libel Suits Over Letters to the Editor*, Los Angeles Metropolitan News-Enterprise, Dec. 15, 1989; *Decision Discourages 'Needless' Libel Suits*, FOLIO, MAGAZINE FOR MAGAZINE MANAGEMENT, June 1989, at 29; *"Chairman's Message,"* 3 ANIMAL LAW REPORT (Animal Protection Committee, Young Lawyers Division, American Bar Ass'n) Apr. 1989; Hentoff, *The Quicksands of Libel*, Washington Post, Apr. 1, 1989; Press Notes, *The Apes Have It*, N.Y. Times, Feb. 14, 1989, at C24.

(c) As a practical matter, the Court of Appeals has held that a Letter to the Editor cannot be the subject of a libel action.

The Court of Appeals applied the "context" branch of the fact/opinion test set forth in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985), to reach the result that the libel letter was protected opinion *because* it appeared under the title "Letter to the Editor." The libel defense bar is already claiming that the Court of Appeals' decision has made letters to the editor a "defamation-free zone." *See* Rich, *Dear editor: Publish this (I dare you): Are letters sections "defamation-free zones"?*, PUB. NEWS, Feb.-Mar. 1990, quoting counsel for media *amici curiae* below.

Chief Justice Rehnquist has observed that:

> "[l]ower courts have seized on the word 'opinion' [in *Gertz v. Robert Welch, Inc.*] to solve with a meat axe a very subtle and difficult question, totally 'oblivious of the rich and complex law of the struggle of the common law to deal with this problem.'"

Ollman v. Evans, 471 U.S. 1127, 1129 (1985) (dissenting from denial of petition for writ of certiorari).

Milkovich should go a long way to resolve the problem, in general, but this case presents the Court with a unique opportunity for further refinement which is sorely needed in order to fully deal with the problem of fact and opinion which this Court is now confronting in *Milkovich*.

II. THE NEW YORK COURT OF APPEALS HAS SET LIBEL PLAINTIFFS AN UNCONSTITUTIONAL AND IMPOSSIBLY HIGH STANDARD FOR PROVING FALSITY BEFORE TRIAL

(a) If the defendant admits a statement was untrue, a court may not constitutionally hold it was true, so as to deprive a libel plaintiff of a jury trial.

In *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), this Court held in general that a libel plaintiff *at trial* has to demonstrate the falsity of defamatory statements, instead of the defendant having to prove their truth. *Hepps* does not mean that libel no longer exists. Immuno's case is an exceptional opportunity for this Court to specify the impact of First Amendment concerns on what a libel plaintiff must show, as to falsity, in order to present that issue to a jury.

Surely, a libel plaintiff is supposed to survive a summary judgment motion under *some* circumstances. True, the libel defense bar professes shocked consternation at the prospect of a *jury* sitting in judgment on a media defendant. *See, e.g.,* Comment, *Journalistic Malpractice: the Need for a Professional Standard of Care in Defamation Cases*, 72 MARQUETTE L. REV. 63, 75-76 (1988); McCrory, Bernius, Jones and Montero, *Constitutional Privilege in Libel Law,* in 1 COMMUNICATIONS LAW 1989 (PLI), 403, 626 (summary judgment minimizes chilling effect by removing risk of jury resolution). Many lower courts and commentators now seem to believe that view emanates from this Court. Immuno believes, however, that this Court does *not* share that view. For instance, in *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), this Court held that courts should not deni-

grate the role of the jury, nor authorize trials by affidavit, on summary judgment motions.

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. [citation omitted]. *Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.* [Citation omitted]."

Liberty Lobby, 477 U.S. at 255, 106 S. Ct. at 2513-14, 91 L. Ed. 2d at 216 (emphasis supplied).

> "We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury *might* return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

Liberty Lobby, 477 U.S. at 257, 106 S. Ct. at 2514-15, 91 L. Ed. 2d at 217 (emphasis supplied).

The RESTATEMENT (SECOND) OF TORTS §617(b), comment a, states that the issue of whether a statement is true or false is normally reserved for the jury. Several courts have followed the Restatement in holding that it is the proper role of the jury, not the court, to determine the falsity of defamatory statements. *See Kohn v. West Hawaii Today, Inc.*, 65 Haw. 584, 656 P.2d 79, 84, (1982) *citing Akins v. Altus*

Newspapers, Inc., 609 P.2d 1263, 1266 (Okla.), *cert. denied*, 449 U.S. 1010, 101 S. Ct. 564, 66 L. Ed. 2d 467 (1980); *Nevada Independent Broadcasting Corp. v. Allen*, 664 P.2d 337, 343 (Nevada, 1983); *Krochalis v. Ins. Co. of North America*, 629 F. Supp. 1360 (E.D.Pa. 1985); *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *rev'd on other grounds sub nom. Anderson v. Liberty Lobby,* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see also Robertson v. McCloskey*, 666 F.Supp. 241 (D.D.C. 1987).

The record of this case demonstrates that Moor-Jankowski knew that a test existed whereby the infectiousness of a chimpanzee could be determined. He claimed to use that very test when determining whether chimpanzees should be released from his own laboratory. Appendix at 95. He did not tell McGreal the test existed when he told her that there was no way to determine whether a released chimpanzee posed a threat to other chimpanzees or humans (which she then wrote back to him in the libel letter). He did not tell the *Journal of Medical Primatology*'s readers there was such a test, when he published McGreal's letter. The Court of Appeals adopted the Appellate Division's findings of fact. The Appellate Division found that the test was expensive, and held that Moor-Jankowski's admission did not raise a triable issue of fact as to the falsity of the accusations he made because it felt that issues which might implicate the First Amendment could not be entrusted to a jury. However, the fact remains that the test does exist, and that if the readers had known the test existed they might have had a different view of Immuno and of its project in Sierra Leone. *See, e.g., Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337 (1977). The Appellate Division did to the jury as Moor-Jankowski did to his readers—denied them the opportunity to judge truth or falsity.

Such judicial contortions to defeat libel claims—premised on a belief that has grown up, without foundation, that this Court supports such efforts—are becoming sufficiently widespread so that courts can seriously consider, and substantively adopt, the idea that the U.S. Constitution *requires* that summary judgment for defendants actually be *favored* in libel actions. For example, the Court of Appeals' opinion in this very case went so far as to say:

> "We have therefore stressed the particular role and importance of summary judgment, where appropriate, in libel cases (*see also,* 145 AD2d, at 127-128)."

74 N.Y.2d 548, 561; Appendix at 12.

In the oft-quoted footnote 9 of *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979), this Court said that actual malice (which turned on subjective awareness of falsity) did not lend itself to summary disposition. In *Liberty Lobby*, this Court stated that *Hutchinson*'s footnote 9 was an acknowledgment of this Court's general reluctance

> "to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws."

Liberty Lobby, 477 U.S. at 256, 106 S. Ct. at 2514, 91 L. Ed. 2d at 216, n.7, *citing Calder v. Jones*, 465 U.S. 783, 790-91, 104 S. Ct. 1482, 1487-88, 79 L. Ed. 2d 804, 813 (1984).

Nonetheless, lower courts seem to disagree and to require definitive guidance. As shown above, in this

case the New York Court of Appeals says special *procedural* protections are required by the U.S. Constitution (in that the court should be predisposed to summary judgment in libel cases). The D.C. Circuit said the same thing in *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011, 87 S. Ct. 708, 17 L. Ed. 2d 548 (1967), a decision that still has great influence even after this Court's decision in *Liberty Lobby*. *See, e.g. Foley v. WCCO Television, Inc.*, 449 N.W.2d 497 (Minn. App. 1989); *Scottsdale Pub., Inc. v. Superior Court in and for County of Maricopa*, 59 Ariz. 72, 764 P.2d 1131 (Ariz. App. 1988); *Stepien v. Franklin*, 39 Ohio App. 3d 47, 528 N.E.2d 1324 (1988); *Moffatt v. Brown*, 751 P.2d 939 (Alaska, 1988); *Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St. 3d 215, 520 N.E.2d 198 (1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 179, 102 L. Ed. 2d 148 (1988).

Put another way: *Liberty Lobby* and *Hutchinson* both said there should be no *procedural* protections beyond the *substantive* law. In Immuno's case, the kind of protection sanctioned by *Liberty Lobby* and *Hutchinson* was extended far beyond what those decisions said was permissible. The result is to keep libel plaintiffs from ever coming before a jury to redress reputational injury.

This case gives this Court an opportunity to set down the parameters of the substantive law as they are to be applied in the *pre-trial* stages of a litigation.

(b) If defendant's counsel acknowledges that a defamatory statement was capable of being proven false, a court may not *determine* the same issue to the contrary, relying upon the First Amendment, so as to deprive a libel plaintiff of a jury trial.

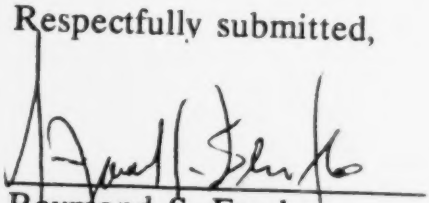
When Moor-Jankowski's counsel argued this case before the New York Court of Appeals, he described the test to determine whether a chimpanzee could carry a hepatitis infection (Tr. Oral Arg. Appendix at 88 (first full paragraph)). Thus, he acknowledged that the premise on which the core libel was based was capable of being proved false, just as Moor-Jankowski admitted the falsity at his deposition (Appendix at 95). But the Court of Appeals held that *every* defamatory statement in the libel letter was either protected opinion or true. Whether the need to avoid a chilling effect on free speech requires a court to ignore admissions of both a defendant and his counsel is something this Court should now address.

CONCLUSION

Petitioner Immuno, AG therefore respectfully requests that this Court grant its petition to consider the

important questions presented and to correct a serious injustice which has precluded it from having its defamation case heard on the merits.

Respectfully submitted,



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Appendix

Appendix–1

DECISION OF THE COURT OF APPEALS
OF NEW YORK
(December 14, 1989)

74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129

State of New York
Court of Appeals

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1 No. 253
Immuno, A.G.,
Appellant,

OPINION

v.
J. Moor-Jankowski,
Respondent.

KAYE, J.

This appeal concerns application of the "settled rule that expressions of an opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions'". *(Steinhilber v Alphonse,* 68 NY2D 283, 286.) Settled though the rule may be, the line separating protected expressions of opinion from actionable assertions of fact has proved elusive. In this case, the primary–and vehemently contested–dispute between the parties concerns the proper category for a letter to the editor of a scientific journal.

I.

This libel action arises out of a letter to the editor published in the Journal of Medical Primatology in

December 1983. The letter was written by Dr. Shirley McGreal, chairwoman of the International Primate Protection League (IPPL), an organization known for its vigorous advocacy on behalf of primates, particularly those used for biomedical research. Defendant Dr. J. Moor-Jankowski, a professor of medical research at New York University School of Medicine and director of the Laboratory for Experimental Medicine and Surgery in primates of the New York University Medical Center, is cofounder and editor of the Journal.

The subject of McGreal's letter (reprinted at 145 AD2d, at 118-120) was a plan by plaintiff, Immuno AG.—a multinational corporation based in Austria that manufactures biologic products derived from blood plasma—to establish a facility in Sierra Leone for hepatitis research using chimpanzees. McGreal's letter was critical of Immuno's proposal on a number of grounds: (1) that the motivation for the plan was to avoid international policies or legal restrictions on the importation of chimpanzees, an endangered species; (2) that it could decimate the wild chimpanzee population, as capture of chimpanzees generally involved killing their mothers, and efforts at returning experimental animals to the wild (as plaintiff proposed) were of questionable success; and (3) that returning the animals to the wild risked spreading hepatitis to the rest of the chimpanzee population. McGreal stated that the current population of captive chimpanzees should be adequate to supply any legitimate requirements.

The letter was prefaced by an editorial note written by defendant that set out its background. Identifying McGreal as chairwoman of IPPL, the note stated that the Journal had received the initial version of the letter in January 1983 and had submitted it to plaintiff

for comment or reply. Plaintiff had acknowledged receipt of the letter in February, offering no comment but that it was referring the matter to its New York lawyers. Thereafter, plaintiff's lawyers wrote that McGreal's statements were inaccurate, unfair and reckless, and requested the documents upon which the accusations were based, threatening legal action if the letter were printed before plaintiff had a meaningful opportunity to reply. The editorial note went on to state that the editors had advised plaintiff's attorneys that they should obtain the documentation directly from McGreal, and extended the period for plaintiff's reply by two months. The letter was published nearly a year after its receipt, after articles had appeared in the Austrian press apparently confirming much of what McGreal had written, and after receiving no further word from plaintiff or its lawyers.

In addition to the McGreal letter that is the focus of contention, plaintiff complains that it was defamed by comments made by defendant quoted in an article entitled "Loophole May Allow Trade in African Chimps" that appeared in the New Scientist magazine shortly before McGreal's letter was published. Defendant is quoted as saying that the supply of captive chimpanzees was sufficient for research, describing defendant's attempts to circumvent controls on endangered species as "scientific imperialism," and warning that they will "backfire on people like me involved in the bona fide use of chimpanzees and other primate animals" for research.

In December 1984, plaintiff commenced this lawsuit against Moor-Jankowski and seven other defendants, including McGreal and the publishers and distributors of the New Scientist and the Journal of Medical Primatology. All the defendants save Moor-Jankowski settled with plaintiff for what the motion court de-

scribed as "substantial sums," and the complaint was dismissed as to them. After extensive discovery, defendant moved for summary judgment. Supreme Court granted the motion to the extent of dismissing a claim for prima facie tort. It denied the motion as to the defamation claims, ruling that the statements at issue were statements of fact and, regardless of whether plaintiff was a public figure, there were triable issues of fact concerning whether defendant acted with actual malice in making or publishing the statements.

On defendant's appeal, the Appellate Division unanimously reversed, granted defendant's motion and dismissed the complaint. The court held that all of the comments attributed to defendant in the New Scientist article were expressions of opinion that could not, as a matter of law, support an action for defamation. As to the McGreal letter, the Appellate Division held that for the most part it too was a constitutionally protected expression of opinion. To the extent that it contained statements of a factual nature, the Appellate Division examined each statement meticulously, and concluded from the voluminous record not only that plaintiff had failed to adduce evidence of falsity but also that all such factual assertions were demonstrably true.

[1] With respect to the comments attributed to defendant in the New Scientist article, we now affirm the Appellate Division order for the reasons stated by that court (145 AD2d 114, 143). With respect to the McGreal letter, we also affirm the Appellate Division order, but on a somewhat different analysis.

II.

However difficult the philosophical or practical

problem of disentangling assertions of fact from statements that do not imply or assert factual matters ("opinion" in the parlance of defamation law analysis), it is settled that pure opinion-however misguided or vituperative-is entitled to the absolute protection of the State and Federal constitutional free speech guarantees (*see, Steinhilber v Alphonse,* 68 NY2d, at 289, *supra; Ollman v Evans,* 750 F2d 970, 974-975, n 6 [DC Cir] [en banc], *cert denied* 471 US 1127).

This distinction between fact and opinion, which grew out of the common-law doctrine of fair comment, was elevated to constitutional status, in the interpretation of State and Federal courts, by the Supreme Court's widely cited dictum in *Gertz v Robert Welch, Inc.* (418 US 323, 339-340), that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on the public issues.'" (Quoting, *New York Times Co. v Sullivan*, 376 US 254, 270.)

It has been suggested that one reason for the distinction between fact and opinion is that statements of fact have greater potential for influence and hence are likelier to damage reputation than mere expressions of opinion, which are more readily discounted by the reader or listener. (Note, *Fair Comment,* 62 Harv L Rev 1207, 1213 [1949].) The *Gertz* passage suggests two additional rationales. The first concerns institutional competence: unlike an assertion of fact, which may be proven true or false by objective standards, an idea or opinion is not susceptible to such measurement by courts and juries.

Perhaps closest to the roots of the distinction in the doctrine of fair comment is the second thread of the *Gertz* dictum—that unlike assertions of fact, ideas or opinions merit protection for their role in a competition or marketplace of ideas, as stimulants of "uninhibited, robust and wide-open debate on the public issues." The more limited common-law defense of fair comment which, among its other elements, required that the criticism concern a matter of legitimate public interest, was similarly concerned with public debate. It protected the right to comment on public affairs and ensured the public's access to important information (*see,* Note, *The Fact-Opinion Determination in Defamation,* 88 Colum L Rev 809, 811 [1988]; Titus, *Statement of Fact Versus Statement of Opinion-A Spurious Dispute in Fair Comment,* 15 Vand L Rev 1203 [1962]). This central concern informs not only its foundation but also the law that has grown out of *Gertz.*

In reviewing the underpinnings for the distinction between fact and opinion, moreover, it is above all important to bear in mind that the exercise is not merely one in semantics. Several courts and commentators have criticized as inadequate any analysis that does not give central significance to the role played by the challenged statements in public debate, or to the "core value" of the free speech guarantee (*see, e.g., Ollman v Evans,* 750 F2d, at 996 [Bork, J., concurring], *supra; Janklow v Newsweek, Inc.,* 788 F2d 1300, 1302-1303 [8th Cir]; Note, *The Fact-Opinion Determination in Defamation, op. cit.,* at 831-840).

While eschewing adherence to any rigid criteria for resolving the legal question of whether a statement is one of fact or opinion, this court has recognized as helpful the four factors identified by the plurality in *Ollman* (750 F2d, at 979, *supra):* "(1) an assessment of whether the specific language in issue has a precise

meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might 'signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.'" (*Steinhilber v Alphonse*, 68 NY2d, at 292, *supra.)* Attention to these factors enables a court to perform its essential task in determining whether a given statement expresses opinion, which is to ascertain "what the average person hearing or reading the communication would take it to mean." (*Id.*, at 290.)

We next apply these legal principles to the facts at hand.

III.

In performing the essential task of ascertaining what the average person reading McGreal's letter would take it to mean, we begin our analysis (as did *Ollman*) with an examination of the context of the challenged remarks. Unlike *Steinhilber* and its predecessors, what is at issue in this case is a special type of expression–a letter to the editor.

Broadly speaking, there are three major types of journalistic activity (*see,* Franklin, *Libel and Letters to the Editor: Toward an Open Forum,* 57 U Colo L Rev 651 [1986]). The first is originating or investigative activity, such as news reporting. Second is commentary or criticism, which generally is protected as opin-

ion. The third function many publications serve is to transmit the views of readers, by providing a public forum known as letters to the editor.

There is a manifest difference between ordinary reporting and letters to the editor. As a rule, such letters are not published on the authority of the newspaper or journal. In this case, for instance, defendant's prefatory editorial note signaled that the letter was to be given only the weight its readers chose to accord McGreal's views; such reservations may be generally understood even when letters are not accompanied by any editorial note. Thus, any damage to reputation done by a letter to the editor generally depends on its inherent persuasiveness and the credibility of the writer, not on the belief that it is true because it appears in a particular publication.

Most importantly, for many members of the public, a letter to the editor may be the only available opportunity to air concerns about issues affecting them. "When a citizen is troubled by things going wrong, he should feel free to 'write to the newspaper': and the newspaper should be free to publish his letter. It is often the only way to get things put right" (*Slim v Daily Tel.*, [1968] 2 QB 157, [1968] 1 All ER 497, 503, quoted in *Pollnow v Poughkeepsie Newspapers,* 107 AD2d 10, 16 [Titone, J.], aff'd on other grounds 67 NY2d 778). The availability of such a forum is important not only because it allows persons or groups with views on a subject of public interest to reach and persuade the broader community but also because it allows the readership to learn about grievances, both from the original writers and from those who respond, that perhaps had previously circulated only as rumor; such a forum can advance an issue beyond invective. Finally, at the least, the public may learn something, for better or worse, about the sort of person or group

that would write such a letter (*see,* Franklin, *op. cit.*, at 663-664).

Thus, in determining how the average person would view McGreal's letter, we take into account that it is a letter to the editor and that "the common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individual opinion." (145 AD2d, at 129.)

Passing from the broader social setting to the immediate context of the letter, we note that the common expectation regarding letters to the editor has particular pertinence here.

As the Appellate Division observed, the Journal of Medical Primatology is directed at a highly specialized group of readers—medical doctors, researchers and the medical and science libraries of academic institutions; the average reader is thus likely not a novice in the field of medical primatology, but brings a "well-developed understanding of the issues facing biomedical researches using primates as research subjects." (145 AD2d, at 129.) The prefatory note additionally called particular attention to the circumstances surrounding the letter, pointing up that this was Dr. McGreal's view, and that plaintiff's attorneys considered her statements to be "wholly inaccurate and reckless" and "not a fair comment" on plaintiff's proposed project.

The letter itself related to a public controversy regarding use of live animals belonging to endangered species, including chimpanzees, in animal experimentation and research. McGreal (a known animal rights activist) and IPPL (whose very name broadcasts its point of view) were fully identified to readers of the letter. The letter made clear that its purpose was to

voice the concerns of this partisan group in order "to draw this situation to the attention of interested parties."

Thus, like the broader social setting of McGreal's letter, its immediate context would induce the average reader of this Journal to look upon the communication as an expression of opinion rather than a statement of fact.

Nor can it be said from the specific language, viewed in its totality, that the body of the letter conveyed statements intended to be understood and accepted by the average reader of this publication as gospel. As a practical matter, it is hard to conceive that any published statement could be wholly devoid of factual reference. Like most—if not all—letters to the editor, McGreal's was provoked by a particular state of affairs, and her letter set out its point of reference. That factual reference point of course must not be false (*see, Silsdorf v Levine,* 59 NY2d 8), but in the present case the Appellate Division's extensive analysis amply establishes that plaintiff raised no triable issue of fact as to the falsity of the threshold assertions of McGreal's letter.

Beyond that threshold reference point, from start to finish the body of the letter communicated the accusations of a group committed to the protection of primates and openly critical of plaintiff's project. Within that framework, the writer presumed and predicted as to what "appeared to be" or "might well be" or "could well happen" or "should be" the motivations for and future consequences of plaintiff's proposed chimpanzee research program, plainly relating matters of opinion rather than flat-out, measurable statements of fact.

Speculations as to the motivations and potential future consequences of proposed conduct generally are not readily verifiable, and are therefore intrinsically unsuited as a foundation for libel (*see, Rinaldi v Holt, Rinehart & Winston,* 42 NY2d 369, *cert denied* 434 US 969).

We reject plaintiff's invitation to engage any further in what would in essence be "a Talmudic parsing" of the length and breadth of this letter, as if "with a philosophical enterprise or linguistic analysis. Ours is a practical task, with elemental constitutional values of freedom looming large as we go about our work. And in that undertaking, we are reminded by *Gertz* itself of our duty 'to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise.'" (*Ollman v Evans,* 750 F2d 970, 991, *supra.)*

Finally, while structuring our analysis to fit within the hardened categories of "fact" and "opinion," we additionally look beyond them to the core values protected by the State and Federal Constitutions. The public forum function of letters to the editor is closely related in spirit to the "marketplace of ideas" and oversight and informational values that compelled recognition of the privileges of fair comment, fair report and the immunity accorded expression of opinion. These values are best effectuated by according defendant latitude to publish a letter to the editor on a matter of legitimate public concern—the letter's author, affiliation, bias and premises fully disclosed, rebuttal openly invited—free of defamation litigation. A publication that provides a forum for such statements on controversial matters is not acting in a fashion "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected" (*Garrison v Louisiana,* 379 US 64, 75), but to the contrary is fostering

those very values.

[2] While concluding that the McGreal letter is within the protection of the constitutional free speech guarantee, two additional matters bear mention.

First, we agree with plaintiff that had defendant deliberately incited McGreal to have a defamatory letter to the editor published, no privilege would shield him from liability. Although defendant discussed the contents of McGreal's letter with her and made suggestions about its contents, plaintiff's allegations of a deliberate effort, or conspiracy, to smear its reputation are entirely conclusory, and therefore do not preclude summary judgment in defendant's favor.

Second, this case—having already engendered thousands of pages of a litigation record and "substantial" settlements from all other defendants—exemplifies that the "'threat of being put to the defense of a lawsuit * * * may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself'". *(Karaduman v Newsday, Inc.*, 51 NY2d 531, 545.) We have therefore stressed the particular role and importance of summary judgment, where appropriate, in libel cases (*see also*, 145 AD2d, at 127-128). That chilling effect can be especially severe for scholarly journals, such as defendant's, whose editors will likely have more than a passing familiarity with the subject matter of the specialized materials they publish; if required as to every line of a reader's expressed viewpoint to meet the standard of *Chapadeau v Utica-Observer Dispatch* (38 NY2d 196), they may as a practical matter have little alternative to lengthy litigation or substantial settlement. In such instances, hypertechnical parsing of a possible "fact" from its plain context of "opinion" loses sight of the objective of the entire exercise, which is to assure

that—with due regard for the protection of individual reputation—the cherished constitutional guarantee of free speech is preserved.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order affirmed, with costs.

Appendix—14

Appendix–15

OPINION OF THE SUPREME COURT OF NEW YORK
NEW YORK COUNTY

(Filed August 6, 1987)

Supreme Court : New York County MI 17
IAS PART 10

IMMUNO AG,

Plaintiff,

Index No.

23545/84

- against -

J. MOOR-JANKOWSKI,

Defendant.

BEATRICE SHAINSWIT, J.:

Defendant moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint.

This motion was begun by a moving affidavit sworn to on September 5, 1986; the final opposing memorandum of law was submitted on April 2, 1982, replying to movant's last papers a week earlier. In the interim the Court received a 100 page supporting memorandum of law, reply memoranda, surreply memoranda, second surreply memoranda, and supplemental reply memoranda, in addition to four main affidavits on each side, bound volumes containing dozens of supplemental affidavits, bound volumes of exhibits whose

numbering ran through the alphabet twice, and innumerable letters from both sides. The Court is constrained to observe that those massive submissions were inappropriate.

Plaintiff in this libel action is Immuno, A.G., an Austrian-based multinational corporation engaged in research, development, manufacturing and marketing of biological pharmaceutical products for therapeutic and preventive uses, including vaccines. Defendant, Dr. Jan Moor-Jankowski, a scientist engaged in biomedical research, is a professor at New York University and Director of the Laboratory for Experimental Medicine and Surgery in Primates ("LEMSIP")—a private medical research facility founded by defendant and brought by him to NYU in 1965—and editor-in-chief of the *Journal of Medical Primatology*.

The resolution of this motion requires a historical background. The action had its genesis in a proposed plan by Immuno to establish a biomedical research facility in the West African nation of Sierra Leone, using captured wild chimpanzees for preclinical testing of hepatitis vaccines. Chimpanzees, being primates, are extremely valuable in research because they are closely related to human beings. Indeed, they have been described as providing an irreplaceable model for study of certain human health problems, with the only alternative subject for such studies being man himself. Specifically, chimpanzees are the only other species that develops type B hepatitis, a major disease of humans, and therefore are used to study hepatitis and to develop and test vaccines.

The population of chimpanzees in the wild has diminished drastically-due, in large part, to (a) the destruction of their habitat in the forests of West Africa by loggers and farmers seeking agricultural land,

and (b) the extermination of the chimpanzees themselves by native farmers, who consider them pests because they eat crops. Moreover, chimpanzees do not breed very successfully in captivity, and many nations ban the export of chimpanzees entirely. (They are protected by an international convention [to which the United States is a signatory], the Convention on International Trade in Endangered Species). As a result of these factors, there is a severe shortage of chimpanzees available for medical research.

THE ALLEGED LIBELS

The first libels upon which this action is hinged have their genesis in a letter to the Editor, and an accompanying Editorial Note, published in the Journal of Medical Primatology. The Letter to the Editor was sent to the Journal by Dr. Shirley McGreal, Chairman of the International Primate Protection League. (Dr. McGreal is not a medical doctor; she is a doctor of education. For reasons which are unclear at this time, but may take on evidentiary significance at trial, when the Letter to the Editor was published, the title "MD" was added after her name.)

Dr. McGreal's letter to the Editor was entitled "A Project With Potential to Spread Non-A, Non-B Hepatitis in West Africa" and stated:

> "The International Primate Protection League has learned with concern of proposals submitted by Immuno AG Company of Austria to the Government of Sierra, Leone, West Africa, regarding the company's plans to establish a chimpanzee research facility in Sierra Leone, West Africa.
>
> According to a statement dated August 23, 1982 submitted to the Government of Sierra Leone by

Klaus Bieber, Austrian Consul in Sierra Leone, the animals would be used in hepatitis non-A, non-B research and testing of hepatitis B vaccine. The purpose of establishing the facility in Africa was stated to be 'to avoid the problems involved with the importation of live chimpanzees.' Presumably, these 'problems' include national and international laws and treaties regarding the movement of live animals belonging to endangered species. The chimpanzees *Pan troglodytes* is listed in Appendix I of the Convention on International Trade in Endangered Species.

Besides getting round restrictions on the international movement of chimpanzees, cheapness of wild-caught chimpanzees appears to be a motivating factor for the Immuno Company. According to the Austrian newspaper Presse (February 3, 1983), Immuno Official Johann Eibl stated that captive breeding of chimpanzees was not an economically viable proposition.

The proposed facility would procure 60-80 chimpanzees per year, to be obtained from the wild. However, according to Bieber's statement, 'it must be emphasized that the research will not bring about a decimation of chimpanzees: on the contrary, their numbers would remain stable.' Readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised at this statement. However, Bieber cheerfully explains the nondetriment theme by saying. 'Because, after going through a research circle of about 3 years, the animals will be in perfect condition and ready for rehabilitation into the wild.'

1. Release of chimpanzee 'veterans' of hepatitis non-A, non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease. Should release of carrier animals occur, hepatitis could well spread among wild chimpanzees over large parts of Africa. Thus chimpanzees could well become a reservoir for hepatitis just as bats are a reservoir for rabies. The result might be increased human persecution of chimpanzees.

2. Although chimpanzee rehabilitation has acquired a certain 'chic,' it is well known that wild chimpanzees attack introduced newcomers. For this reason, chimpanzees in the Mount Asserik project in Senegal directed by Stella Brewer had to be recaptured and released on islands in the River Gambia with no resident chimpanzees. As yet, no permanent home has been located for these animals. The rehabilitation procedures take many years per animal and are extremely costly and hence not feasible on the scale that would be required to start 60-80 animals per year on rehabilitation. Assuming a 5-year training per animal, there could be up to 400 animals undergoing rehabilitation at any given time, at the cost of millions of dollars annually. It is questionable whether, in spite of the most dedicated efforts, any rehabilitated chimpanzees will become totally normal, since they are usually removed from the wild at 1-2 years of age and thus miss the most critical years of their social development.

3. Capture of wild chimpanzees for research is in clear violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research. Chimpanzees are

listed in the Red Data Book of the International Union for the Conservation of Nature as 'vulnerable.' The WHO statement 'strongly recommends' that endangered, vulnerable, and rare species be considered for use in biomedical research projects only if they are obtained from *existing* [emphasis added] self-sustaining captive breeding colonies (i.e., captive-breeding all animals required to at least the F-2 generation).

4. Currently, there are over 1000 chimpanzees in US laboratories, as well as large numbers in the Netherlands, Poland, Liberia, etc. These animals should be enough to supply any legitimate requirements for chimpanzees.

The International Primate Protection League shares the scientific community's concern over hepatitis. However, we feel that a way can and must be found to solve this problem without recourse to the dwindling populations of wild chimpanzees. Therefore, we appreciate the opportunity to draw this situation to the attention of interested parties.

Shirley McGreal, MD
Chairwoman
International Primate
Protection League
P.0. Drawer X
Summerville, SC 29483"

The Letter to the Editor was prefaced by the following accompanying Editorial Note, written by defendant Moor-Jankowski (it is conceded that this was the first and only time in the history of the Journal that such an accompanying note had appeared):

"In January 1983, the Editors of the Journal of Medical Primatology received a letter from Dr. Shirley McGreal, Chairwoman of the International Primate Protection League, alerting the biomedical community to a new attempt to establish another chimpanzee research laboratory in Africa. This was seen by Dr. McGreal as a violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research, and as away to avoid the Convention on International Trade in Endangered Species (CITES).

The Editors submitted Dr. McGreal's letter for 'comments or reply' to IMMUNO AG in Vienna, Austria which had been mentioned as the company interested in establishing the laboratory. IMMUNO acknowledged the receipt of the letter on February 17, 1983, but provided no comments, referring the matter to their lawyers in New York. The lawyers requested that the Journal of Medical Primatology provide them with the documents on which Dr. McGreal's accusations were based, they termed the statements to be wholly inaccurate and reckless. They further stated (March 3rd, 1983, letter from Goldschmidt, Fredericks & Oshatz, New York): 'We would also like to advise you that our review of Dr. McGreal's letter indicates that it is not a fair comment regarding our client's activities, and should you proceed with publication, without giving us the opportunity for a meaningful response, we shall be compelled to take whatever action we deem necessary to redress our client's rights.'

The Editors advised the law firm that Dr. Shirley

McGreal should be contacted directly for access to the original documents, and they extended the period for receiving the rebuttal to April 20, 1983. During that period no additional information was received from IMMUNO or from their lawyers, but in the meantime, the matter was discussed in the Austrian press, and Dr. McGreal feels that these newspaper articles confirmed the contents of her letter. The final text of Dr. Shirley McGreal's letter of March 23, 1983, reflects the discussion in the Austrian press which occurred after her initial letter of January 30th was submitted for publication and this final letter is printed below."

Plaintiff asserts that the purpose of this Editorial Note was to increase the impact of Dr. McGreal's Letter to the Editor and to convey a totally false impression of impartiality on the part of Moor-Jankowski and of authority on the part of Dr. McGreal.

In addition to the Letter to the Editor and Editorial Note published in the Journal, plaintiff complains about "waves" of similar libels, all of which allegedly originated with, or were instigated by, defendant Moor-Jankowski. For example, an article published in the October 26, 1983 edition of the *New Scientist*, written by one Nancy Heneson, entitled "Loophole May Allow Trade in African Chimps" also concerned IMMUNO's plans to establish a chimpanzee research facility in Sierra Leone. That article contained the following comments, attributed to Moor-Jankowski:

"The role of the WHO which is backing research into hepatitis-B vaccine, is being questioned increasingly. Immuno claims to have the support of the WHO. However, Ian [sic] Moor-Jankowski, the director of New York University's Pri-

mate Research Laboratories, which is collaborating with the WHO on primate research, has condemned the project. There are enough chimpanzees in captivity to satisfy the needs of biomedical research, says Moor-Jankowski. Immuno's attempt to circumvent the controls on endangered species is 'scientific imperialism'. He says. It will 'backfire on people like me involved in the bona fide use of chimpanzees and other primate animals in biomedical experimentation'.

Moor-Jankowski says that the WHO will have to take a stand on the Immuno project soon because 'important people are upset' about a letter sent to the president of Sierra Leone by the Aga Khan. The hereditary ruler of the Ismaili Moslems, best known for his fabulous wealth and love of horse-racing, is also an influential member of the World Wildlife Fund's International Council."

This lawsuit was begun in December 1984 against 'J. Moor-Jankowski, Shirley McGreal, Alan R. Liss, Inc., Nancy Heneson, New Science Publications, IPC Magazine, Ltd., "John Doe" Distributor of "New Scientist" Magazine, and "John Doe" Distributor of "Journal of Medical Primatology".' All defendants other than Dr. Moor-Jankowski—including Shirley McGreal and the publishers and distributors of New Scientist Magazine and the Journal of Medical Primatology—have settled with plaintiff for substantial sums, and the complaint has been dismissed as to them.

THE PARTIES ARE IN SHARP DISAGREEMENT AS TO THE TRUE CORE OF THIS LAWSUIT

In support of his motion for summary judgment dismissing the complaint, defendant Moor-Jankowski

argues that this action was initiated by plaintiff in order to silence him and his valid criticism of its proposed research facility in Sierra Leone, and to squelch legitimate scientific debates among distinguished scientists. He argues that the publications were constitutionally protected expressions of opinion on a controversial subject.

Plaintiff, on the other hand, asserts that, to Moor-Jankowski, Immuno is seen as a competitor for the very limited supply of chimpanzees available for biomedical research; and he further urges that defendant used his position on the editorial staff of the Journal to attack plaintiff and other scientists. Plaintiff urges that Moor-Jankowski conspired with Dr. McGreal against plaintiff, although he knew her to be "a very radical anti-vivisectionist" and a "crazy woman."[1]

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[1]Although Moor-Jankowski has denied ever describing Dr. McGreal as a "crazy woman", plaintiff asserts that this alleged characterization of her by defendant was given to them by a former lawyer for Moor-Jankowski who is now a federal tax court judge. The court need not resolve that issue at this time. However, on this motion it is admissible not to show whether she was, in fact "crazy", but the state of mind of defendant concerning he reliability and her reputation, whether defendant acted responsibly in publishing her Letter to the Editor, and whether the defendant's "refereeing" (i.e., the allegedly independent verification of the facts asserted and conclusions reached therein) was reasonable and responsible under the circumstances. Hearsay evidence, which might otherwise be inadmissible at trial, is admissible and may be considered by the court to defeat a motion for summary judgment by showing the existence of triable factual issues (*Phillips v. Joseph Kantor & Co.*, 31 NY2d 307 [1972]). This is not to be construed as the law of the case, or a prejudgment by this court, as to whether the alleged statement is or is not hearsay and is or is not admissible at trial, for whatever purpose it may be offered (if at all).

Plaintiff contends that Moor-Jankowski conspired with, or enlisted the aid of, Dr. McGreal in order to keep her from criticizing his own activities because he, like Immuno, used chimpanzees for biomedical research, and he allegedly feared that she might turn her attentions towards his company, LEMSIP, which has been described (by another justice of this Court in an earlier motion herein) as his "alter ego".

Plaintiff has also accused Moor-Jankowski of bearing personal ill will and malice towards it, based upon an episode that occurred some years ago, when Immuno attempted to bring back to Austria some of its own chimpanzees, which it had previously furnished to LEMSIP for research purposes.[2]

Plaintiff denies most vigorously Moor-Jankowski's basic charge that it was risking a hepatitis epidemic in West Africa, planning to shoot large numbers of chimpanzee mothers in order to obtain juvenile chimpanzees for its purposes, and circumventing an international convention for the protection of chimpanzees. On the contrary, plaintiff asserts that it planned to obtain wild chimpanzees for its planned facility in Sierra Leone from an individual allegedly recommended to it by Moor-Jankowski, who was to capture chimpanzees with nets or obtain them from farmers,

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[2]According to plaintiff, in 1981 Moor-Jankowski placed all types of obstacles in the way of the return to plaintiff of its chimpanzees, including the filing of a false complaint with the ASPCA and the airline and personally directing the operator of the fork lift, which was placing the cage onto a truck for transportation to the airport, to suddenly drop the cage to the ground, thereby jarring the chimpanzees unnecessarily. Defendant's motive allegedly was his ire at losing Immuno's business (and the money for LEMSIP) as well as the loss of chimpanzees with which he had been doing research.

who kept them as pets, rather than by shooting the mothers and other adults in order to capture the babies.

THE LAW

(a) It is clear that the statements complained of by plaintiff, if false, are actionable defamations. See *Ocean State Seafood, Inc. v. Capital Newspaper*, 112 AD2d 662 (3d Dept. 1985); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, (1977), cert. den. 434 U.S. 979 (1977); *Silsdorf v. Levine*, 59 NY2d 8 (1983), cert. den. 464 U.S. 831 (1983).

(b) Defendant asserts, however, that his writings (and those of Dr. McGreal) are constitutionally protected expressions of opinion (*Rinaldi v. Holt, Rinehart & Winston, Inc., supra*). It is true that a writer cannot be sued for simply expressing his or her opinion of another person, however unreasonable or vituperative the statement may be (*Gertz v. Robert Welch, Inc.*, 418 US 323 [1974]; *Buckley v. Littell*, 539 F. 2d 882, [2nd Cir. 1976], cert. denied, 429 U.S. 1062 [1977]. But the premises on which defendant builds his defense are faulty.

It is for the Court to determine whether the complained-of statements constitute fact or opinion. The Court rules that the statements at issue are statements of fact. One cannot read the complained-of statements without coming away with the abiding understanding that defendant was making factual charges disparaging plaintiff's scientific activities–*inter alia*, as a fact, defendant was charging that plaintiff was risking a hepatitis epidemic in West Africa, cynically planning to shoot large numbers of chimpanzee mothers at periodic intervals in order to obtain juvenile chimpanzees for its own purposes, and violating, through subterfuge, an

international convention for the protection of chimpanzees. It would be playing a game of semantics to endow these factual charges with the cloak of opinion.

(c) In support of his motion, defendant also argues that plaintiff is a "public figure" or a "limited purpose" or "limited issue" public figure.

A private person who is normally not a public figure may become one in a particular factual situation. Where the evidence demonstrates that plaintiff has taken affirmative steps to attract personal attention or has striven to achieve a measure of public acclaim, and by his own purposeful activities thrust himself into the public eye, he is considered a public figure (*Maule v. New York Magazine Corp.*, 54 NY2d 880 [1981]; *James v. Gannett Co.*, 40 NY2d 415, 422 [1976]). Where an individual voluntarily injects himself or allows himself to be drawn into a *particular* public controversy, that person becomes a public figure for a limited range of issues, and is considered a "limited purpose public figure" (*O'Neil v. Peekskill Faculty Ass'n*, 120 AD2d 36 [2nd Dept. 1986]; *Gertz v. Robert Welch, Inc.*, *supra*, or a "limited issue public figure" (*Greenberg v. CBS, Inc.*, 69 AD2d 693 [2d Dept. 1979]).

However, a private individual does not automatically become a public figure merely by becoming involved in or associated with a matter that attracts attention. Absent proof that the plaintiff voluntarily thrust or injected himself into the forefront of a public controversy, he cannot be dragged unwillingly into the controversy and be considered a "public figure" (*Wolston v. Reader's Digest*, 443 U.S. 157 [1979]).

A "public figure" bears the burden of demonstrating with "convincing clarity" that the alleged defamato-

ry falsehood was uttered with "actual malice", i.e., with "knowledge of falsity or reckless disregard of whether it was false or not" (*Rinaldi v. Viking Penguin, Inc.*, 52 NY2d 422, 436 [1981]; *New York Times v. Sullivan*, 376 U.S. 254, 285-286 [1964]).

It is unnecessary to rule at this time whether plaintiff is a public figure in all respects, or at the very least a limited issue public figure. Even under the stringent standard of actual malice, triable issues have been properly raised, on this record, as to whether defendant perpetrated conscious falsehoods, or published statements with reckless disregard as to whether they were true or false.

Similarly, we need not be detained by applying to this record the "grossly irresponsible" standard enunciated in *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 NY2d 196 [1975]; *Gaeta v. New York News, Inc.*, 62 NY2d 340 [1984]. Plaintiff has submitted sufficient evidence to meet the more exacting standard of constitutional "actual malice". Patently, he has also fulfilled the "grossly irresponsible" *Chapadeau* standard.

(d) The following illustrates some of the central factual issues to be resolved at a trial:

(1) Was plaintiff risking a hepatitis epidemic in West Africa for its own cynical selfish purposes?

(2) Was plaintiff bent on violating an international convention for the protection of chimpanzees?

(3) Was plaintiff engaged in a pattern of subterfuge to camouflage or circumvent its violation of an international convention?

(4) On all the evidence adduced at trial, is plain-

tiff to be considered a public figure for all issues, or a public figure for a limited range of issues?

(5) Assuming plaintiff is a public figure, whether for a limited range of issues or otherwise, did defendant publish alleged defamatory falsehoods with knowledge of falsity, or with reckless disregard of whether they were false or not?

(6) Assuming that the "grossly irresponsible" guidelines become applicable at trial as an alternative to *N.Y. Times v. Sullivan*, did defendant publish the alleged falsehoods in conformity with the standards of responsible journalism?

(7) Assuming that all of these factual issues are resolved in plaintiff's favor, to what extent is plaintiff entitled to a monetary award?

The trial may bring to the surface additional factual issues paralleling those defined in the course of this opinion. But enough factual issues have already emerged to leave no room for summary judgment displacing trial.

Accordingly, defendant's motion for summary judgment dismissing the defamation claims is denied.

(e) Plaintiff has also pleaded a cause of action for prima facie tort. The key to prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful (*ATI, Inc. v. Ruder & Finn, Inc.*, 42 NY2d 454, 458 [1977]). Under modern pleading theory, which permits alternative pleading, one can plead prima facie tort in the alternative with a traditional tort; but once a traditional tort is established, the cause of action for prima facie tort

disappears (*Board of Education of Farmingdale Union Free School District v. Farmingdale Classroom Teachers Ass'n., Inc., Local 1889, AFT AFL-CIO*, 38 NY2d 397 [1975]; *Curiano v. Suozzi*, 63 NY2d 113 [1984]). Moreover, an essential element of a cause of action for prima facie tort is special damages (*Curiano v. Suozzi, supra*; *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 59 NY2d 314 [1983]). Special damages must be alleged with sufficient particularity to identify actual losses (*Lincoln First Bank of Rochester v. Siegel*, 60 AD2d 270, 280 [4th Dept. 1977]; *John C. Supermarket, Inc. v. New York Property Insurance Underwriting Ass'n.*, 60 AD2d 807 [1st Dept. 1978]). Damages pleaded in round sums, without any attempt at itemization, do not satisfy the required allegation of special damages (*Leather Development Corp. v. Dun & Bradstreet, Inc.*, 15 AD2d 761 [1st Dept. 1962], aff'd. 12 NY2d 909 [1963]).

In the case at bar, in view of the fact that there is a traditional cause of action–defamation–and, more important, in view of plaintiff's failure to adequately allege and set forth special damages with particularity, that branch of defendant's motion seeking summary judgment dismissing plaintiff's cause of action for prima facie tort is granted and it is dismissed.

Settle order.

DATED: August 6, 1987

/s/
J. S. C.

Appendix–31

OPINION OF THE APPELLATE DIVISION
OF THE SUPREME COURT OF NEW YORK,
FIRST JUDICIAL DEPARTMENT
(January 17, 1989)
145 A.D.2d 114, 537 N.Y.S.2d 129

SUPREME COURT, APPELLATE DIVISION
First Department, December 1987

Francis T. Murphy, P.J.
Joseph P. Sullivan
David Ross
Ernst H. Rosenberger
George Bundy Smith, JJ.

Immuno AG,

Plaintiff-Respondent,

31557

against

J. Moor-Jankowski,

Defendant-Appellant

Appeal by the defendant-appellant from an order of the Supreme Court, New York County (Beatrice Shainswit, J.), entered on August 17, 1987 which, inter alia, denied its motion for summary judgment.

Raymond S. Fersko, of counsel (Anders R. Sterner, Mitchell Lapidus and Cynthia J. Leinwand, with him on the brief; Tanner Gilbert Propp & Sterner, attorneys) for the plaintiff-respondent

Robert G. Sugarman, of counsel (Philip A. Byler and Kenneth L. Bressler with him on the brief; Weil, Gotshal & Manges, attorneys) for the defendant-appellant

Michael S. Zachary, of counsel (Moses & Singer, attorneys), on behalf of the New York Civil Liberties Union, as *amicus curiae*

Henry R. Kaufman, attorney for World Wildlife Fund, as *amicus curiae*

Laura M. Mattera, attorney for the Sierra Club, Humane Society of the United States, American Society for the Prevention of Cruelty to Animals, Animal Protection Institute of America, Animal Welfare Institute, United Action for Animals, Friends of Animals and International Wildlife Coalition, as *amici curiae*

MURPHY, P.J.:

This libel action was commenced in December, 1984 against numerous defendants only one of whom, the appellant Dr. Jan Moor-Jankowski, has managed to remain in the action to seek a determination on the merits.

The plaintiff, Immuno, A.G. (hereinafter Immuno) is an Austrian based corporation with related corporate entities in some thirty countries. Immuno manufactures biologic products derived from blood plasma. These products are tested for safety and efficacy on chimpanzees, the only primates suitable for such purposes.

Defendant Moor-Jankowski is a universally acknowl-

edged authority on the use of primates in biomedical research. He is professor of medical research at the New York University Medical School and Director of New York University Medical School's Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP). He is also Director of the World Health Organization Collaborating Center for Hematology of Primate Animals and the editor-in-chief of the Journal of Medical Primatology.

In December, 1983, Moor-Jankowski caused to be published in the Journal of Medical Primatology a letter to the editor by Dr. Shirley McGreal.[1] Dr. McGreal is the chairwoman of the International Primate Protection League (IPPL). The IPPL is an organization which has advocated strenuously, and often effectively, for the humane treatment of primates, particularly those used in biomedical research. Dr. McGreal's letter was sharply critical of a proposed plan by plaintiff Immuno to build a medical research facility in the West African nation of Sierra Leone. The text of the letter follows:

"A Project with Potential to Spread
Non-A/Non-B Hepatitis in West Africa"

The International Primate Protection League has learned with concern of proposals submitted by Immuno AG Company of Austria to the Government of Sierra, Leone, West Africa, regarding the company's plans to establish a chimpanzee research facility in Sierra Leone, West Africa.

According to a statement dated August 23, 1982

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[1]Dr. McGreal is not a medical doctor. She has a D.Ed. degree.

submitted to the Government of Sierra Leone by Klaus Bieber, Austrian Consul in Sierra Leone, the animals would be used in hepatitis non-A, non-B research and testing of hepatitis B vaccine. The purpose of establishing the facility in Africa was stated to be 'to avoid the problems involved with the importation of live chimpanzees.' Presumably, these "problems" include national and international laws and treaties regarding the movement of live animals belonging to endangered species. The chimpanzees *Pan troglodytes* is listed in Appendix I of the Convention on International Trade in Endangered Species.

Besides getting round restrictions on the international movement of chimpanzees, cheapness of wild-caught chimpanzees appears to be a motivating factor for the Immuno Company. According to the Austrian newspaper *Presse* (February 3, 1983), Immuno Official Johann Eibl stated that captive breeding of chimpanzees was not an economically viable proposition.

The proposed facility would procure 60-80 chimpanzees per year, to be obtained from the wild. However, according to Bieber's statement, it must be emphasized that the research will not bring about a decimation of chimpanzees: on the contrary, their numbers would remain stable. Readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised at this statement. However, Bieber cheerfully explains the nondetriment theme by saying,

> Because, after going through a research circle of about 3 years, the animals will be in perfect condition and ready for rehabilitation into the

wild.

The International Primate Protection League is concerned over Immuno's plans on many grounds; to cite just a few of them:

1. Release of chimpanzee "veterans" of hepatitis non-A, non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease. Should release of carrier animals occur, hepatitis could well spread among wild chimpanzees over large parts of Africa. Thus chimpanzees could well become a reservoir for hepatitis just as bats are a reservoir for rabies. The result might be increased human persecution of chimpanzees.

2. Although chimpanzee rehabilitation has acquired a certain "chic," it is well known that wild chimpanzees attack introduced newcomers. For this reason, chimpanzees in the Mount Asserik project in Senegal directed by Stella Brewer had to be recaptured and released on islands in the River Gambia with no resident chimpanzees. As yet, no permanent home has been located for these animals. The rehabilitation procedures take many years per animal and are extremely costly and hence not feasible on the scale that would be required to start 60-80 animals per year on rehabilitation. Assuming a 5-year training per animal, there could be up to 400 animals undergoing rehabilitation at any given time, at the cost of millions of dollars annually. It is questionable whether, in spite of the most dedicated efforts, any rehabilitated chimpanzees will become totally normal, since they are usually removed from the wild at 1-2

years of age and thus miss the most critical years of their social development.

3. Capture of wild chimpanzees for research is in clear violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research. Chimpanzees are listed in the Red Data Book of the International Union for the Conservation of Nature as "vulnerable." The WHO statement "strongly recommends" that

> endangered, vulnerable, and rare species be considered for use in biomedical research projects only if they are obtained from *existing* [emphasis added] self-sustaining captive breeding colonies (i.e., captive-breeding all animals required to at least the F-2 generation).

4. Currently, there are over 1000 chimpanzees in US laboratories, as well as large numbers in the Netherlands, Poland, Liberia, etc. These animals should be enough to supply any legitimate requirements for chimpanzees.

The International Primate Protection League shares the scientific community's concern over hepatitis. However, we feel that a way can and must be found to solve this problem without recourse to the dwindling populations of wild chimpanzees. Therefore, we appreciate the opportunity to draw this situation to the attention of interested parties.

Shirley McGreal, MD
Chairwoman
International Primate
Protection League

P.O. Drawer X
Summerville, SC 29483

The letter was prefaced with an editorial note by Moor-Jankowski explaining the circumstances under which it had come to be published. A draft of the McGreal letter had first been received by Moor-Jankowski in January, 1983. Shortly thereafter, in February, 1983, Moor-Jankowski sent a copy of the draft letter to Dr. Hans Eibl of Immuno, requesting comments or a reply letter. Immuno referred the matter to its New York attorneys who wrote Moor-Jankowski in March, 1983, demanding access to the documents upon which McGreal had relied in composing her letter and threatening legal action if the letter was printed before an opportunity for meaningful response was provided. Moor-Jankowski refused Immuno's request for McGreal's source material, but extended the deadline for a response from Immuno until April 20, 1983. The letter was eventually published in December, 1983, nearly a full year after receipt of the draft, and after articles had appeared in the Austrian press apparently confirming much of what McGreal said.

Prior to publication of the McGreal letter, in October, 1983, an article entitled "Loophole May Allow Trade in African Chimps" appeared in New Scientist magazine. The article's author, Nancy Heneson, had interviewed Moor-Jankowski concerning the proposed Immuno project and reported that he had condemned the project terming it "scientific imperialism." Moor-Jankowski expressed to Heneson his concern that Immuno's attempt to circumvent treaty restrictions on trade in endangered species would reflect poorly on others, himself included, engaged in biomedical research using chimpanzees. He also offered the view that the World Health Organization

would soon find it necessary to take a stand on the Immuno project since the project apparently conflicted with WHO policy respecting the use of endangered, vulnerable and rare species in biomedical research. As noted in the McGreal letter, the recommended WHO policy was that members of endangered, vulnerable and rare species were not to be used as research subjects unless they were obtained from "existing self-sustaining breeding colonies." Moor-Jankowski indicated to Heneson that there were enough chimpanzees in captivity to meet research requirements.

It is Immuno's claim in this action that the McGreal letter and the statements attributed to Moor-Jankowski in the New Scientist article are libelous. The claim has been pursued with great vigor, and by the time the present motion by the defendant for summary judgment was submitted the record had grown to over 4000 pages. After a thorough review of this lengthy record, we conclude that the statements contained in the letter and New Scientist article are not actionable and that the defendant is entitled to summary judgment dismissing the complaint.

The common law of libel provides a plaintiff with a means to recover for injury to reputation caused by statements which are both false and defamatory. Although false, the statements must purport to be factual for expressions of opinion are constitutionally protected and hence nonactionable. *(Gertz v. Welch,* 418 US 323, 339-49; *Rinaldi v. Holt, Rinehart & Winston,* 42 NY2d 369, 380; *Steinhilber v. Alphonse,* 68 NY2d 283, 289.)

In denying defendant's motion for summary judgment, the court held, "It is clear that the statements complained of by the plaintiff, if false, are actionable defamations." Necessary to this broad holding was the

court's determination that the statements about which Immuno complained were factual and, therefore, undeserving of the constitutional immunity afforded expressions of opinion. The court observed, "One cannot read the complained-of statements without coming away with the abiding understanding that defendant was making factual charges disparaging plaintiff's scientific activities—*inter alia*, as a fact, defendant was charging that plaintiff was risking a hepatitis epidemic in West Africa, cynically planning to shoot large numbers of chimpanzee mothers at periodic intervals in order to obtain juvenile chimpanzees for its own purposes, and violating through subterfuge, an international convention for the protection of chimpanzees. It would be playing a game of semantics to endow these factual charges with the cloak of opinion."

We think that the court's analysis was flawed in several respects. First, we disagree with the court's rather abrupt conclusion that the statements at issue were entirely factual. Although the McGreal letter did contain some assertions of a factual sort, it would seem plain that its ultimate objective was to express certain opinions which, while highly critical of plaintiff's proposal, did not rise to the level.of outright accusations of wrongdoing. It was, moreover, the case that the factual assertions upon which McGreal's opinions rested were evidently true; although it had a more than adequate opportunity to do so, plaintiff did not in opposition to defendant's summary judgment motion adduce evidence of falsity sufficient to warrant the motion's denial. Contrary to the assumption which seemed to inform the court's opinion, the truth or falsity of the assertions made in the McGreal letter was not a matter necessarily to be reserved for trial. The extensive record before the court indicated quite clearly that plaintiff would not be able to sustain the claim necessary to the proof of its case that the

McGreal letter's factual content was false.

It was in *Gertz v. Robert Welch, Inc.*, 418 US 323, 339-40, *supra*, that Justice Powell writing for the Court stated, "[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (Id. at 339-40.) From this dictum has sprung a considerable body of decisional law in which courts have sought to determine whether allegedly defamatory statements are to be deemed expressions of opinion privileged under the First Amendment, or statements of a factual sort possibly outside the First Amendment's protective scope. (*See, Ollman v. Evans*, 750 F2d 970, 975 n6 *cert denied*, 471 US 1127; *see also e.g., Steinhilber v. Alphonse, supra; Parks v. Steinbrenner*, 131 AD2d 60.) The determination has been thought one best left to the court rather than the jury since, as has been often remarked, the line separating fact from opinion is frequently difficult to discern. (*See e.g., Steinhilber v. Alphonse, supra* at 290; *Ollman v. Evans*, supra at 978.) Whether language has as its principal purpose the transmission of a viewpoint or purports to represent a true state of affairs depends not only upon the words chosen but upon the context in which they are employed. The task set the court then is a delicate one requiring sensitivity both to literal signification and to the way in which a statement will be understood. To be sure, literal meaning, to the extent it is ascertainable, has a bearing upon the way in which an expression is understood, but the relationship is subject to varying degrees of attenuation depending upon the tone employed by an author or the author's evident use of exaggeration or understatement. While there exists no absolutely definitive test to guide courts in distinguishing what will be understood as opinion from what will be understood as fact,

the inquiry has not been thought entirely resistant to analysis. Indeed, the inquiry has been committed to the courts precisely because it is one requiring an analytic approach if it is to be addressed with some measure of consistency and predictability. (*See Ollman v. Evans, supra* at 978.) It must not be forgotten that in articulating the boundaries separating fact from opinion courts concern themselves not with a narrow semantic inquiry but with one having a profound constitutional dimension; we determine no less than what may and, to a degree, what may not be freely said. In a society such as ours dependent upon and committed in a fundamental way to the free exchange of information and ideas, it is vitally important that those who would speak and write not be deterred from doing so because of uncertainty over whether they will come within the First Amendment's protective ambit. It is then generally agreed that in sorting fact from opinion courts should employ some analytic criteria and that those criteria should be applied so as not to restrict unduly the range of free expression. (*See, supra,* at 991.)

The question ultimately to be answered in assessing whether a statement is one of opinion or fact is how it would be perceived by an average member of the audience to whom it is directed. (*Steinhilber v. Alphonse, supra,* at 290; *Parks v. Steinbrenner, supra,* at 63.) Although, as noted, there is no definitive, universally applicable set of criteria to be employed in addressing this question, courts have found it useful to focus upon the language used to see if it has a precise meaning capable of objective verification. It has also been thought useful to examine the immediate context in which a complained of statement is presented to ascertain whether the form and content of the communication as a whole would alert the reader or listener to the circumstance that what is being expressed is

opinion rather than fact. And, going beyond the statement itself and the immediate setting in which it is presented, courts have considered the broader social context to ascertain the manner in which that context may affect the average reader's or listener's perception of a statement as being either one of fact or opinion. These considerations were the subject of an extensive scholarly presentation by Judge Starr in his well known plurality opinion in *Ollman v. Evans* (750 F2d 970, *cert denied* 471 US 1127), *supra*, and their utility has since been favorably commented on by the Court of Appeals (*see, Steinhilber v. Alphonse*, 68 NY2d 283, 292, *supra*), and this court (*see, Parks v. Steinbrenner*, 131 AD2d 60, 63, *supra*). While they constitute no more than general guides to inquiry the individual importance of which will vary depending on the facts of each case, they should not be dispensed with lightly, and especially not in favor of a court's subjective sense of what is and is not factual. The question of whether a statement is one of fact or opinion is after all to be dealt with as a matter of law and requires in its address the application of some reasonably objective, even if general, criteria. (*See, Ollman v. Evans, supra*, at 978.)

It would seem that the universe of expression has been divided for the purposes of libel law analysis between the realms of fact and opinion. Although opinion enjoys absolute constitutional immunity, statements of a factual sort do not. Nevertheless, liability for a defamatory statement of fact is not automatic; a true statement cannot be the basis for a libel plaintiff's recovery. Truth is, of course, a principal object of discourse in a free society its ascertainment being indispensable to the beneficial exercise of individual, but even more importantly, collective judgment. Indeed, there can be no doubt that the right of the public to know what is true must take precedence over an individual's right to recover for a

damaging remark. What has been more controversial is who should bear the burden of proving truth or the lack of it.

Although it was the case at common law that good repute was presumed as was the falsity of a statement damaging to a person's name, and that it was therefore left to the defendant to prove as an affirmative defense that the complained of statement was true (*see, e.g.,* Prosser, Torts [4th ed], § 116, p 798; Seelman, Law of Libel and Slander in New York, pars 170, 392 [rev ed]), there are certain kinds of cases in which that is no longer the rule. The demise of the common law presumption of falsity may be traced to *New York Times v. Sullivan*, 376 US 254 where the Supreme Court held that a public official may not prevail upon a defamation claim unless the defendant's actual malice is demonstrated with convincing clarity (*supra* at 283; *see also, Garrison v. Louisiana*, 379 US 64; *Curtis Publishing Company v. Butts*, 388 US 130.) Implicit in the New York Times holding was the requirement that the public figure plaintiff prove falsity, for the actual malice standard entailed a showing of the defendant's calculated use of falsehood. As this state's Court of Appeals observed, "[A]lthough there has been doubt (citation omitted), the burden is now on the libel plaintiff to establish the falsity of the libel. (*Cox Broadcasting Corp. v. Cohn*, 420 US 469, 490.) This requirement follows naturally from the actual malice standard. Before knowing falsity or reckless disregard for the truth can be established, the plaintiff must establish that the statement was, in fact, false." (*Rinaldi v. Holt, Rinehart*, 42 NY2d 369, 380, *supra*)

In *Gertz v. Robert Welch, Inc.* (*supra* at 345), of course, the Supreme Court recognized that the states retained "substantial latitude" to prescribe the level of culpability necessary to sustain a libel action brought

by a private figure plaintiff, thereby permitting such a plaintiff to prevail on something less than a showing of actual malice. The New York Court of Appeals exercised this "substantial latitude" in *Chapadeau v. Utica Observer* (38 NY2d 196) stating, "where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." (*Supra* at 199.) Although *Chapadeau* allowed a private figure plaintiff to recover upon a showing of fault less demanding than that constitutionally required of public figure plaintiffs, New York Courts held that the standard of culpability articulated in *Chapadeau, i.e.* gross irresponsibility, still necessitated the plaintiff's proof of falsity: "We see no significant distinction where the plaintiff is held to be a private figure and the topic of the article is a matter of public concern. In such cases the plaintiff is required to prove gross irresponsibility (***) resulting in a defamatory falsity. Under such circumstances, proof of falsity is again naturally related to the standard of care. Thus, in a case with constitutional implications such as the one at bar, the defamed plaintiff must prove falsity, irrespective of his status (*see Wilson v. Scripps-Howard Broadcasting Co.*, 642 F2d 371)." (*Fairley v. Peekskill Star*, 83 AD2d 294, 297.) That this approach was correct and, indeed, constitutionally mandated, at least where media defendants were concerned, became apparent after the decision of the Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps* (475 US 767). There, the Court held "the common-law presumption

that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." (*Supra* at 777.) Recognizing that there would be cases in which a media defendant might have great difficulty proving the truth of a statement even though it was in fact true the Court observed, "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. ... Because such a 'chilling' effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could only result in a deterrence of speech which the Constitution makes free. *Speiser v. Randall*, 357 US 513, 526." (*Supra*, 475 US, at 777.)

There is no question that the present defendant is a media defendant, nor is there question that the speech at issue is at least "arguably within the sphere of legitimate public concern. (*Chapadeau v. Utica Observer-Dispatch*, *supra* at 199.) Plaintiff concedes as much when it urges that it is a "private figure, subject to the grossly irresponsible standard," thus acknowledging the existence of conditions warranting Chapadeau's application to the facts at bar. But even if the concession had not been made, we would have no difficulty finding that the McGreal letter contained speech of public concern. Plainly, the plans of a party to undertake a course of activity which would possibly frustrate efforts of the international community to safeguard an endangered species, are of public concern. This and the media status of the defendant being beyond dispute, *Philadelphia Newspapers*, *supra*, dictates that plaintiff must prove that the defamatory state-

ments are false if it is to prevail.

The allocation of the burden of proof dictated by *Philadelphia Newspapers, supra*, has the consequence that a libel plaintiff opposing a motion for summary judgment must come forward with proof in evidentiary form sufficient to generate a triable issue as to the offending statement's falsity. If no such proof is offered, the defendant is entitled to prevail. (*See, Rinaldi v. Holt, Rinehart & Winston, supra*, at 382; *Pollnow v. Poughkeepsie Newspapers, Inc.*, 67 NY2d 778, 779; *see also Brady v. Ottaway Newspapers*, 84 AD2d 226, 242-43; *Fairley v. Peekskill Star Corp., supra*, at 297.)

The importance of summary adjudication in the context of libel litigation cannot be overemphasized. Libel actions are notoriously expensive to defend and, indeed, "[T]he threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." (*Washington Post Co. v. Keogh*, 365 F2d 965, 968 [J. Skelly Wright, J.] *cert denied* 385 US 1011). While the threat of defamation actions cannot be eliminated so long as states consistent with their traditional and worthy concern for personal reputation continue to afford victims of libel and slander civil recourse, it has been thought desirable and necessary to the ends served by the First Amendment to limit the circumstances under which recovery may be had and, in so doing, to encourage pretrial disposition of all but those lawsuits involving defamatory speech susceptible of being proved false, culpably uttered and damaging. Thus, the cases following in the wake of *New York Times* and *Gertz, supra*, have mandated the summary dismissal of libel actions based on nonfactual statements and have, through the imposition of stringent standards of fault and the reallocation of

evidentiary burdens on the issue of falsity, rendered libel actions—particularly those involving speech of public concern and public figure plaintiffs—ever more vulnerable to early dismissal. Whether these constitutionally based limitations upon the availability of a remedy for defamation have been successful in diminishing the threat posed free expression by proliferating lawsuits is a subject of ongoing debate. It is, however, certain that if their motions for summary judgment are erroneously denied, libel defendants will not be substantially better off than they were at common law before the era of First Amendment jurisprudence ushered in by *New York Times v. Sullivan*, *supra*. To unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights. Thus it has been recognized that "[I]n the First Amendment area, summary procedures are even more essential [than in other kinds of litigation]. For the stake here, if harassment succeeds is free debate." (*Washington Post Company v. Keogh*, *supra*, at 968.) For this reason the courts of this state have repeatedly instructed against reluctance in the application of the ordinary rules governing summary judgment in libel cases. (*See e.g., Karaduman v. Newsday, Inc.*, 51 NY2d 531, 545; *Gaeta v. New York News*, 62 NY2d 340, 351; *see also Rinaldi v. Holt, Rinehart & Winston*, *supra*, at 384; *Freeze Right Refrig. & Air Conditioning Servs. v. City of New York*, 101 AD2d 175, 181.)

That the motion court in this case was evidently reluctant to apply the ordinary summary judgment criteria, and apparently indicated its indisposition even to entertain a summary judgment motion is regrettable. It is disturbing that the plaintiff had, by threatening legal action, managed to delay publication of the

McGreal letter for almost a year, and that it succeeded in coercing what the motion court referred to in its decision as "substantial settlements from all but one of the original defendants for the obvious reason that the costs of continuing to defend the action were prohibitive. It is, however, particularly unfortunate the one remaining defendant was not granted the summary relief to which he was so clearly entitled, for the careful examination of the record required of us especially in libel actions (*see, Rinaldi v. Holt, Rinehart & Winston, supra* at 384), leads unavoidably to the conclusion that none of the statements about which the plaintiff complains are actionable.

Before turning in detail to the substance of the McGreal letter, certain general observations regarding the context in which the letter was published are in order. The Journal of Medical Primatology is a publication directed at a highly specialized group of readers. Its subscribers are, almost without exception, medical doctors, researchers, and the medical and science libraries of academic institutions. The scientific studies published in the Journal are of a formal and technical sort. It must be presumed that those who consult the Journal are not novices in the field of medical primatology and that they bring to their reading a well developed understanding of the issues facing biomedical researchers using primates as research subjects. Aside from their specialized knowledge, the Journal's readers, a group largely comprised of those with advanced scientific training, must be presumed skilled in the dispassionate evaluation of information and argument.

McGreal's remarks were presented to this sophisticated readership in the relatively modest format of a letter to the editor; there was absolutely no attempt to vest the letter's contents with the trappings of objectivi-

ty and authority reserved in other parts of the Journal for articles presenting scientific findings. The common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individual opinion. Surely, this expectation was not defeated in this case. The limited factual basis for Dr. McGreal's conclusions was immediately evident from the letter's text, and indeed it is the hallmark of "pure opinion" that it is accompanied by a recitation of the facts upon which it is based. (*See Steinhilber v. Alphonse, supra*, 68 NY2d, at 289; *see also,* Restatement [Second] of Torts §566 comments b and c.) This is because when stated facts are merely supportive of and do not require a conclusion, it must be thought that the conclusion is in the nature of comment or opinion; the claim made is not that the comment must be true, but that it represents the view most persuasively justified by the facts at hand. It would have been particularly evident to the Journal's readers that McGreal's conclusions as to the advisability of the Immuno proposal were no more than opinions. Certainly, the Journal's readers would not have confused her predictive assertions respecting the risks of the Immuno proposal for matters of fact.

The editorial note preceding the letter underscored the circumstance that the views expressed in the letter were McGreal's and the letter itself repeatedly spoke in cautious terms of its author's "concerns." It was moreover clear that McGreal's concerns were those of an animal rights activist. The letter and the prefatory editorial note both drew the reader's attention to the fact that McGreal was Chairwoman of the International Primate Protection League. In this capacity she had become well known as a staunch advocate for strict limitations on the use of primates in biomedical research. The Journal's readers were well aware of

this. Indeed, some of them, defendant Moor-Jankowski included, had been past targets of her criticisms. They would have understood that Dr. McGreal's comments as to the advisability of a research project such as that proposed by Immuno were likely to reflect in some measure her general inclination to look askance at proposals for research involving chimpanzees. The debate between animal welfare activists and proponents of research involving animals as research subjects had been underway for years at the time the McGreal letter was published. It was a debate whose tone had not always been moderate and in the course of which exaggerated pronouncements were not uncommon; the rhetoric often belied the complexity of the underlying scientific and ethical issues. Had Dr. McGreal actually made factual charges of the sort the motion court thought would be understood from her letter (*see, supra,at 118-120*), we think that they would, in light of the tone of the larger debate, have been viewed as little more than overstatements reflective in considerable part of their author's well known biases. As it was, however, the letter was, although sharply critical, quite careful to distinguish between fact and comment. That Dr. McGreal's observations upon the cited facts did not reflect well upon Immuno is clear, but that they were her observations and did not purport to be matters of fact is also clear. As such, they cannot support a recovery for defamation. Regarding the underlying factual propositions, as we shall see, those were, on the extensive record before us, either demonstrably true, or apparently insusceptible of being proved false, and in either event nonactionable.

Some factual background is necessary in order properly to evaluate the letter's various assertions.

To begin, it is not disputed that in April, 1982, the

Austrian government ratified the Convention on International Trade in Endangered Species (CITES). As is here relevant, CITES provides, "The import of any specimen of a species included in Appendix I [chimpanzees are so included] shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met *** (c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes." Soon after CITES was ratified by the Austrian legislature, Immuno which had been conducting its research in Austria using imported chimpanzees, initiated inquiries to establish a research center in Sierra Leone using chimpanzees native to that country's forests.

Klaus Bieber, the Austrian Honorary Consul in Sierra Leone, states in his affidavit that he met with representatives of Immuno in Vienna in July, 1982. He was at that time instructed to take all necessary steps on Immuno's behalf to facilitate the establishment of a biomedical research center. For his efforts, it was agreed that Bieber would receive an "honorarium" of $1000 every six months. Bieber labored in Immuno's behalf for approximately two years. He evidently brought the proposed project to the attention of highly placed Sierra Leone government officials and arranged ministry level meetings at which Immuno s representatives could present their proposal directly to the authorities whose approval was required for the project to go forward. Apparently sensitive to issues of protocol, Bieber notes in his affidavit that he advised Immuno that once the project was approved and underway it would be appropriate to give the Sierra Leone president a "nice gift"; he thought a chandelier would do.

Bieber acknowledges in a letter to Shirley McGreal dated March 8, 1983, that on August 23, 1982, he authored a document describing the proposed Immuno project. The document whose obvious purpose was to explain the project to Sierra Leone government officials is titled "Hepatitis Research Institute." It states that the research to be conducted with chimpanzees at the institute would include the development of inactivation procedures for Non-A/Non-B hepatitis viruses in plasma fractions and the testing of hepatitis B as well as Non-A/Non-B vaccines. The reason for choosing Sierra Leone as the site for the research facility is frankly set forth: "To avoid problems involved with the importation of live chimpanzees, Immuno AG has decided to set up a research facility in West Africa, as the source of the animals, and Sierra Leone is its first choice." The document then seeks to reassure that the research will not cause the decimation of the wild chimpanzees to be captured and used as research subjects since the animals are to be rehabilitated after a three year "research circle" and returned to the wild in "perfect condition." According to the document, the proposed research institute's intake will be approximately 60 to 80 chimpanzees per year. Sierra Leone government approval is thus sought "to permit the company to obtain the necessary number of chimpanzees to carry on research."

Sierra Leone government documents whose authenticity and accuracy are not disputed by Immuno, confirm that the above described proposal was formally presented to Sierra Leone ministry officials by Immuno representative Gerald Eder at a meeting held at the Sierra Leone Ministry of Forestry and Agriculture on April 18, 1983. On April 20, 1983, Dr. Abass Bundu, the Sierra Leone Minister of Agriculture, reported to the Secretary to the President on the discussion of the

Immuno proposal which had transpired at the meeting two days before. Dr. Bundu explains that the research conducted at the proposed center would seek to "develop inactivation procedures of Non-A/Non-B plasma fractions, and to "prove the potency and safety of the hepatitis B as well as of the Non-A/Non-B hepatitis vaccines." As is here relevant, Dr. Bundu's report went on to indicate that Immuno had asked to be provided with 60 to 80 chimpanzees a year. Dr. Bundu had expressed reluctance to furnish so large a number and proposed instead that Immuno initially be given 50 to 60 animals to begin small scale research while starting a breeding farm from which it would obtain its supplies in future years. In this connection, Dr. Bundu noted, "[i]ncidentally, the main reason why the Austrians are proposing to establish the centre in Sierra Leone is precisely because they would not otherwise be able to import chimpanzees into Austria by virtue of the Washington Agreement for the Protection of Endangered Species in Flora and Fauna [CITES] to which Sierra Leone and Austria are both signatories." Bundu was skeptical about Immuno's rehabilitation plans observing: "The company had in mind transferring the chimpanzees after the experiment to some isolated uninhabited island for rehabilitation purposes. We did not think this was a sound proposal: first, wild animals domesticated normally do not revert to their natural habitat easily, nor are they usually accepted back by their own kind. In fact their fate is invariably death; second, putting them on an island would be tantamount to founding a new animal colony entirely for the returners—an environment which would certainly not be natural; thirdly, there is the risk of transmission of viruses acquired during the experimentation; and finally there are no isolated uninhabited islands as such since nearly all our islands are frequently visited by artisanal fishermen. For all these reasons, we rejected the idea and suggested instead

that a breeding farm be established by the Centre."

These reservations notwithstanding, Bundu recommended that the project be approved, in principle.

Keeping the above recounted factual background in mind it is appropriate now to return to the alleged "libel letter" to evaluate the nature of the assertions there made.

First, there can be no doubt that the letter accurately reported that Immuno intended to establish a research center in Sierra Leone. The letter also accurately stated the contents of the August 23, 1982, Bieber document describing the proposed project and its objectives. As to the letter's observations concerning Immuno's motives for locating the research center in Sierra Leone, these were not presented as matters of fact but as interpretations of Immuno's conduct justified by certain stated facts. It was, after all, true that the strict import and export restrictions imposed by CITES threatened to cut off Immuno's supply of wild caught chimpanzees for use in its Austrian laboratories. It was also true that Dr. Johann Eibl of Immuno had stated in the Austrian press that captive breeding of chimpanzees was not economically viable. Under these circumstances it was fair to conclude that Immuno wished to get around the CITES restrictions and was situating the facility in Sierra Leone with that purpose in mind. That was, of course, precisely the conclusion drawn by Dr. Bundu after listening to Dr. Eder's April 18, 1983, presentation. Indeed, Dr. Eder in a letter dated January 12, 1983, addressed to Franz Sitter, a renowned, and in some quarters, infamous, chimpanzee dealer with whom Immuno had transacted extensive business, acknowledged Immuno's concerns: "We think that there is hardly any chance that we will be allowed to import the animals necessary for our

experiments to Austria before long. There are various reasons for this. On the one hand, the authorities either do not want to permit the importation due to a wrong conception of environmental protection or the respective purviews of responsibility are not clearly defined when it comes to issuing an import permit. On the other hand, the excessive prices charged for chimps call the economic feasibility of this type of venture into question. For this reason we have planned to carry out such a project in Africa itself with the intention that it should be conducted at the highest possible level."

The CITES Secretariat, the international body responsible for overseeing the treaty's administration, also viewed the plans of Immuno as an attempt to avoid the treaty's trade restrictions. In a letter dated February 15, 1984, the Secretariat stated: "As noted in our letter of 12 October 1983, the project appears to be an attempt to circumvent the restrictions imposed by CITES. Immuno wish [*sic*] to import chimpanzees into Austria but are restrained from doing so by Austria's accession to and implementation of CITES. Thus, the attempt to establish a centre in Sierra Leone can only be reasonably interpreted as an effort to avoid the effects of CITES. ... the project is apparently a deliberate attempt to circumvent the provisions of the Convention."

In any case, the issue before us is not, as it would have been at common law, whether Dr. McGreal's comments concerning Immuno's motives were fair (*see*, Restatement [Second] of Torts § 566, comment b), and it would appear that they were eminently fair, but whether they were statements of opinion, and about that there can be no doubt. Inquiry as to motivation is generally absolutely privileged (*see Rinaldi v. Holt, Rinehart & Winston, supra*, 42 NY2d, at 382), for

motivation is ordinarily hidden from view and it is, therefore, understood that most statements concerning motivation do not proceed from certain knowledge but from the observation and interpretation of conduct. The present case is no exception. Dr. McGreal did not pretend to know conclusively why Immuno wished to establish a research facility in Sierra Leone. Rather, she recited certain facts from which she presumed that the motive was avoidance of the CITES treaty's effect. Her presumption did not exclude the possibility of another more benign motivation, it merely indicated that in the absence of contrary facts it was her opinion that the avoidance of treaty restrictions probably figured prominently in Immuno's decision making. As to her statement that "cheapness of wild caught chimpanzees appears to be a motivating factor for the Immuno Company., this description of what appeared to be the case was plainly an expression of opinion justified by statements made to the Austrian press by Immuno official Johann Eibl (*see, infra*, at 136). It may be observed that had Dr. McGreal at the time she composed her letter known all that has been disclosed in the discovery phase of this litigation, she might quite confidently have charged, as a fact, that Immuno wished to avoid the CITES treaty in order to obtain relatively cheap wild caught chimpanzees for its research. These motives have, of course, been frankly confirmed in the aforecited statements of Immuno officials (*see, supra*, at 131; *infra*, at 136).

Moving now to the fourth paragraph of the letter, McGreal there asserted that the facility proposed in the earlier cited August 23, 1982 statement by Consul Bieber would procure 60 to 80 chimpanzees from the wild annually. McGreal then observed that chimpanzees are in most cases captured by killing mother chimpanzees and thereafter taking the surviving juvenile chimps. She noted with evident skepticism that

Bieber had claimed that regular removal of so many chimps from the wild would not lead to their depletion since Immuno planned to rehabilitate the chimps after the research cycle was complete and to return them to the wild in "perfect condition."

Immuno takes great exception to McGreal's account of its plans. They note that they eventually agreed not to take 60 to 80 wild chimps annually, but to take only 50 to 60 chimps once to meet their needs during their research facility's first year of operation and thereafter to obtain their supply of chimps from a breeding station which they consented to establish near the research facility. While the evidence indicates that Immuno apparently did alter its original proposal at the insistence of Sierra Leone government officials, it is difficult to perceive how this alteration supports Immuno's defamation claim. There is no question that McGreal's letter accurately recited the specifications of the proposal set forth in the August 23, 1982 Bieber statement. There is also no question that the very same proposal was urged upon the Sierra Leone government by Immuno official Gerald Eder as late as April, 1983. It is also plain that Immuno would have adhered to its original proposal had the Sierra Leone government not insisted upon the above described concessions. Obviously, McGreal's true report of Immuno's initial proposal, the source and date of which were scrupulously identified by her, cannot support a recovery for defamation.

Particularly perplexing is the claim, implicit in Immuno's argument, that the disclosure of its original proposal was defamatory. It must be stressed that this was Immuno's own proposal. Surely Immuno does not suggest that its very own plan, one which it apparently would have been happy to pursue, was so ill-conceived and so obviously pernicious in its methods and proba-

ble consequences that its accurate disclosure caused Immuno reputational injury. If the plan was so clearly misguided the wound which its disclosure is alleged to have caused is self-inflicted and cannot be redressed through the law of libel.

At most, Immuno can claim only that McGreal failed to indicate in her letter that certain Sierra Leone government documents showed that as of April, 1983 the original plan had evidently been superseded by one reflecting modifications required by Sierra Leone ministry officials as a condition of recommending the project's approval "in principle." The omission of this information from McGreal's letter was not defamatory. McGreal's criticisms had as their identified target the original proposal. The letter made no claim that the proposal criticized was the most current plan under consideration.

There was, moreover, good reason for both McGreal and Moor-Jankowski to believe that the original plan had not, despite Immuno's apparent concessions, been conclusively abandoned. In January, 1983, the respected Austrian newspaper Die Presse reported concerning the Immuno project: "There seems to be disagreement among the 'fathers' of the project as far as the breeding of chimpanzees is concerned: While General Consul Harrer confirms that the research institute will also include a breeding station, Immuno's director, Eibl, points out the almost unsurmountable difficulties that prevent a profitable breeding of these animals. According to him, the needed chimpanzees shall all be taken from the wild."

Obviously, there was cause to doubt that Immuno would in April, 1983, easily abandon its intention to obtain its chimps exclusively from the wild, in favor of a breeding plan which Immuno's director, Eibl, had so

recently rejected out of hand as fraught with "unsurmountable difficulties." The difficulties with the breeding plan were indeed profound, for as the expert testimony in the record demonstrates with virtual unanimity, the 50 to 60 wild caught juvenile chimpanzees with which Immuno under its revised plan proposed to start its research and breeding would not reach breeding age for about ten years.[2]

Doubts about Immuno's ultimate intentions were also warranted by Immuno's failure publicly to renounce the earlier plan. Indeed, the defendant provided Immuno with an opportunity to clarify its intentions and to correct any misimpressions which the McGreal letter might create. Thus, shortly after receiving the letter, Moor-Jankowski, in February, 1983, forwarded a copy of it to Eibl with a cover letter

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[2]The following deposition testimony by Dr. Alfred Prince, a noted expert in the captive breeding of chimpanzees is particularly revealing:

> "Q If you had been told that Immuno did not plan to obtain 60 to 80—if you had read in the letter to the editor of Shirley McGreal, not that Immuno was planning to obtain 60 to 80 chimpanzees in the wild in Sierra Leone, but rather that it was planning to start the center with 50 to 60 chimpanzees, which the government of Sierra Leone would give it, and then start a breeding colony, would you have a different opinion as to intelligence [of the plan]?
>
> "A No, certainly not. ***
>
> "A That would be even more unrealistic. The government of Sierra Leone has no chimps. Dr. Sitter can obtain chimps and would be the person to obtain chimps for him. He would obtain little babies. They would then have to wait 10, 12 years until they began to get a trickle of offspring, a very expensive proposition, and it wouldn't satisfy their needs."

which read in pertinent part:

"I would appreciate receiving your comment or reply. Depending on what we hear from you we will either publish Dr. Shirley McGreal's letter together with your comments or, if the allegations in her letter can be proved to us to be incorrect we will return the letter to Dr. McGreal declining its publication.

"The Editors-in-Chief of the Journal consider this matter of highest importance in view of the past results of interventions by Dr. McGreal whose visits and negotiations with the former Prime Minister of India, Mr. Desai, resulted in the ban on rhesus monkey exportation which she was able to maintain with Mrs. Indira Gandhi. Dr. McGreal is also credited with the ban on rhesus exportation from Bangladesh. She has successfully interfered with primate animal programs which she considered inhumane in several laboratories both at universities and at NIH. Thus, we cannot take lightly the enclosed letter and I have to ask you to be kind enough to reply so that I may have your response within one month, i.e. before the 10th March as I will not be able to delay the publication of her letter without due cause. It is the policy of the Journal to allow all the concerned parties to take a position in a controversial matter."

Eibl responded on February 22, 1983. He acknowledged receipt of the draft letter but made no attempt to address its content. Rather, he urged the editor-in-chief of the Journal of Medical Primatology to seek Moor-Jankowski's unbiased advice, observing that Moor-Jankowski as head of LEMSIP had "vast experience" in the field of medical primatology and was well aware of its problems. (Eibl was apparently unaware that Moor-Jankowski was the editor-in-chief of the Journal of Medical Primatology.) Referring to the

"non-scientific side" of the draft letter, Eibl indicated that that would be brought to the attention of Immuno's New York attorneys.

Less than two weeks later, on March 3, 1983, Immuno's New York counsel wrote to Moor-Jankowski demanding copies of McGreal's source documents. Counsel claimed that no response to the draft letter could be given by Immuno until it had seen the materials upon which McGreal had relied for her information. Immuno's attorneys threatened to take legal action if the letter was published without an opportunity for "meaningful response."

By letter dated March 22, 1983 Moor-Jankowski replied to the March 3 letter. He refused the document request but extended the time for Immuno to submit a response to the draft letter until April 3, 1983. He noted, "I may add that I am astonished by your request in that matter which is not usual in dealing with source material of the press in this country. Moreover, the contention of Dr. McGreal has been reported and confirmed in the Austrian press."

On April 11, 1983, Immuno's attorneys responded to Moor-Jankowski's March 22 letter, again claiming that their client was unable to frame a proper response to the McGreal draft letter without access to its author's source documents. The threat to take legal action if the letter was published was repeated.

As can be seen, though it was afforded what must be regarded as a generous opportunity to clarify its plans, Immuno never did so. Even after it had allegedly changed its initial proposal in April, 1983, it made absolutely no effort to confirm that circumstance to Moor-Jankowski prior to the McGreal letter's December, 1983 publication. It is well to recall that

"[T]he first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." (*Gertz v. Robert Welch, Inc., supra*, 418 US, at 344.) Having entirely failed to pursue this "first remedy" which was made so extraordinarily available to it, Immuno is not now in a position to complain. It has, in any event little to complain about; there has been no lie or error, but merely an apparent, and, under the circumstances, understandable failure by the defendant to present Immuno's research plans in their most current form. We note that Immuno's excuse for failing to avail itself of the opportunity to respond, namely that it could not frame a proper reply without access to McGreal's source material, is nonsensical. No one knew better about Immuno's plans than Immuno itself. If McGreal's assertions were in error or were not current Immuno was in no way disabled from indicating that by its lack of access to McGreal's source material.

The fact which an honest reply from Immuno would have been powerless to alter was that, as the McGreal letter reported, Immuno had entertained and actively promoted a most problematic plan. With the evident purpose of circumventing an international treaty, it had approached the Sierra Leone government and requested to be supplied yearly with 60 to 80 chimpanzees for its research purposes. It has not been seriously disputed in the course of this litigation that, as Dr. McGreal stated, chimps are most often caught by killing their mothers, and it has been estimated that for every juvenile chimp captured, 5 to 10 mothers are killed. Even Immuno acknowledged that its original plan without any amoeliorative measures might lead to a further depletion of the already endangered West African chimpanzee population and for this reason proposed to rehabilitate the chimps and return them to

the wild. Unfortunately, as Dr. McGreal pointed out, this was not a viable option. Previous attempts to rehabilitate chimpanzees such as the Mount Asserik project in Senegal were very costly and had not been highly successful; there was little reason to suppose that an attempt would succeed in Sierra Leone. Dr. Bundu, it will be recalled, had succinctly summarized the many difficulties standing in the way of a rehabilitation project such as the one proposed by Immuno (*see, supra, at 132-133*), not the least of which was the lack of an appropriate site in Sierra Leone. Indeed, a review of the record fails to disclose any real controversy over the unfeasibility of Immuno's originally proposed plan to return the chimpanzees to the wild.

Although vigorously maintaining that its rehabilitation plan had been abandoned by the time of the McGreal letter's publication, Immuno nevertheless is understandably sensitive to Dr. McGreal's allegation that it contemplated a course of action entailing the risk of the spread of hepatitis. It will be recalled that Dr. McGreal had stated that the release of research veterans "could well" lead to the dissemination of the non-A/non-B virus among the African chimpanzee population, turning the chimpanzees into a reservoir for hepatitis. The stated basis for this assertion was that there was no test to determine whether an animal was a non-A/non-B carrier. McGreal reasoned that without such a test any plan to release non-A/non-B research veterans would carry with it the risk that non-A/non-B carriers would be among those returned to the wild where they would come in contact with and quite possibly infect other animals. It is quite clear that Dr. McGreal was correct in her observation that there is no way of definitely determining whether an animal is a non-A/non-B carrier. Dr. Alfred Prince, the discoverer of non-A/non-B hepatitis and widely regarded as the preeminent authority on

that form of hepatitis, testified at his deposition that the carrier state in chimpanzees who have been infected with non-A/non-B hepatitis is quite common. Dr. Prince stated that minimally 25 to 50% and possibly as high as 75 or even 100% of animals remain non-A/non-B carriers indefinitely after they are no longer actively diseased. Dr. Prince expressly confirmed that, as Dr. McGreal had stated, there is no test to identify the viral agent which causes non-A/non-B hepatitis, and indeed Immuno's own Dr. Eder co-authored an article acknowledging that the virus lacks "generally accepted serological and morphological markers. (4 *Hepatology Mag* 510 [1984]). There is then no real issue as to the accuracy of the factual premise underlying McGreal's concern that undetected non-A/non-B carriers might be released. Immuno urges, however, that although there is no test for the non-A/non-B virus, it is possible to ascertain whether an animal is still infectious, and that it would, therefore, have been possible to prevent the release of infectious chimpanzees, thus removing any risk of the spread of non-A/non-B hepatitis. But, here again, Immuno's plan would seem to have been completely unrealistic, for the test Immuno claims it would have performed to determine whether its former research subjects were still infectious was to inoculate a healthy animal with the blood of a research veteran and see whether the healthy chimp developed hepatitis symptoms. Dr. Prince termed this procedure "expensive," "laborious" and "wasteful," and observed that it would involve the infection of healthy chimpanzees. He noted that the procedure's many drawbacks made its use rare. Under these circumstances, McGreal can hardly be faulted for not assuming that Immuno would necessarily perform the inoculation procedure on every one of the many chimps it intended to return to the wild. Without any practical means of screening for non-A/non-B carriers, there was certainly some risk

reasonably to be perceived in a rehabilitation scheme such as that proposed by Immuno.

The extent of the risk following from the release of non-A/non-B carriers was a matter of opinion. No one could foresee precisely what the consequences would be. As Dr. Prince noted in his deposition testimony and in his letter-to-the-editor responding to Dr. McGreal's letter, there was much that was not known concerning the prevalence and duration of the carrier state and the transmissibility of the non-A/non-B virus among chimpanzees. Certainly, Dr. McGreal did not invite a contrary impression when she spoke of what "could well" happen if carrier animals were released.

We turn now to McGreal's statement that, "[C]apture of wild chimpanzees for research is in clear violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research." The record shows that the World Health Organization and the Ecosystem Conservation Group[3] had indeed issued a policy statement on the use of nonhuman primates for biomedical purposes. The statement observed in relevant part:

"A total of 76 primate taxa are currently considered endangered, vulnerable or rare by IUCN. Since these taxa are either in serious decline or already at very

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[3]The Ecosystem Conservation Group (ECG) is made up of members from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Environment Program (UNEP), the Food and Agriculture Organization of the United Nations (FAO), and the International Union for Conservation of Nature and Natural Resources (IUCN).

low and precarious population levels, any exploitation of them threatens their continued survival. Therefore, the ECG and WHO strongly recommend that:

"(1)endangered, vulnerable and rare species be considered for use in biomedical research projects only if they are obtained from existing self-sustaining captive breeding colonies (i.e., in captive breeding, all animals are required to be at least F2 generation)."

Obviously, Immuno's proposal which, even in its revised form, involved the use of animals listed as "vulnerable" taken from the wild, and which, in any event, did not contemplate the use of animals obtained from "existing self-sustaining captive breeding colonies" would have run afoul of this policy statement. McGreal's assertion was quite simply true. It is not deprived of its validity by Immuno's efforts to magnify it into an accusation of illegality. Viewed fairly, McGreal's assertion does no more than state accurately that Immuno's proposal was not consistent with the policy which had been strongly recommended by the World Health Organization.

In the McGreal letter's penultimate paragraph, it is stated that there are over 1000 chimpanzees in captivity and that these should be sufficient to meet legitimate research requirements. Dr. Eibl of Immuno conceded in his deposition testimony that Dr. McGreal's estimate of the number of chimpanzees in captivity was most probably correct. He also apparently conceded that it was a matter of opinion whether that number was, as Dr. McGreal claimed, adequate to meet legitimate research needs. But even if the concession had not been made it would be hard to view the assertion as anything but opinion. It would have been plain to the Journal's readers that McGreal's notion of what was a legitimate requirement

for chimpanzees was bound to be very limited indeed. McGreal was, in fact, well known for her general disapproval of most research involving chimpanzees; for her the welfare of the animals was the predominant concern and her assessment of the legitimacy of research requirements was bound to reflect that concern. No one would have understood her statement—"[T]hese animals [the estimated 1000 in captivity] should be enough to supply any legitimate requirements for chimpanzees"—as the product of an objective and dispassionate evaluation of biomedical research needs. In any case, McGreal did not say, as Immuno now finds it advantageous to claim, that Immuno's requirements were not legitimate, only that to the extent that they were legitimate they could be met without resorting to wild chimpanzee populations. This meaning, which we do not think defamatory, is reinforced in the last paragraph of the letter where McGreal acknowledges the importance of hepatitis research but urges at the save time that "a way can and must be found to solve this problem [the problem of hepatitis] without recourse to the dwindling populations of wild chimpanzees." It is interesting to note that McGreal's position as to how legitimate research needs should be met was not fundamentally different from that of the World Health Organization in its above quoted statement. Indeed, if anything, McGreal's position was the more moderate one since she did not, like the World Health Organization, recommend that research subjects be limited to second generation captive bred chimps which were exceedingly scarce, but simply advocated that the chimps not be obtained from the wild.

The comments attributed to Moor-Jankowski in the New Scientist article do not require extensive comment. Moor-Jankowski's somewhat colorful use of the expression "scientific imperialism" to describe the

proposed Immuno project, the salient features of which had been discussed earlier in the article, was nothing more than a way of expressing a disapproving opinion of what Immuno evidently wished to do. Precisely what "scientific imperialism" is is far from clear. It is one of those "loosely definable" or "variously interpretable kinds of expressions which cannot support an action for defamation. (*See, Ollman v. Evans, supra,* 750 F2d at 980.) Manifestly, it would be an altogether pointless exercise to have a jury determine whether Immuno had in fact practiced "scientific imperialism." The statement does not lend itself to verification and cannot, therefore, be regarded as one of fact. (*See, supra,* at 981; *see also Buckley v. Littell,* 539 F2d 882, 895 *cert denied* 429 US 1062.) As for Moor-Jankowski's other comments in the New Scientist article, namely that Immuno's attempt to circumvent treaty restriction would reflect poorly on other researchers and that the World Health Organization would soon find it necessary to take a position on the Immuno project, these too were readily identifiable statements of opinion. The limited factual basis for these opinions was set forth in the course of the article and it would seem highly unlikely that any reader would have mistaken them for assertions of fact.

As can be seen from the foregoing, of the many statements cited by the plaintiff in this ill-focused libel suit, there was not one that was actionable. Without exception, the statements at issue were either opinion absolutely privileged under the First Amendment, or statements which the plaintiff utterly failed to show susceptible of being proved false. Indeed, most of the factual statements claimed by the plaintiff to be defamatory were, on the record before us, demonstrably true! Given these rather striking and fundamental deficiencies in plaintiff's case, it is unnecessary for us to reach the issue of malice with which plaintiff

seems to have been preoccupied. Large portions of the record are taken up with testimony and documents through which the plaintiff attempts to show that Moor-Jankowski bore ill-will towards Immuno and that Moor-Jankowski considered Immuno a competitor whose research efforts he wished to undermine. Plaintiff urges that the alliance between Moor-Jankowski and Shirley McGreal, people who had previously had strong differences and apparently had not always held each other in high regard, had no other purpose but to smear Immuno's reputation. None of this evidence, however, has any relevance to the dispositive issues in this case. Regardless of what the defendant's motives may have been, what was said was not actionable and the law of libel was not properly used by the plaintiff as an instrument for its suppression.

Accordingly, the order of the Supreme Court, New York County, (Beatrice Shainswit, J.), entered August 17, 1987, which, *inter alia*, denied the motion of defendant Moor-Jankowski for summary judgment, should be reversed, on the law, to the extent appealed, the motion granted, and the complaint dismissed, with costs.

The motion by prospective *amici curiae* World Wildlife Fund, Sierra Club, et al., and the New York Civil Liberties Union for leave to appear and file briefs should be granted.

SULLIVAN, ROSS, ROSENBERGER and SMITH, JJ., concur.

Order, Supreme Court, New York County, entered on August 17, 1987, unanimously reversed, on the law, to the extent appealed, the motion granted, and the complaint dismissed. Appellant shall recover of respondent $75 costs and disbursements of this appeal.

The motion for leave to appear and file briefs is granted.

Order filed.

ORDER GRANTING MOTION FOR LEAVE TO APPEAL
(reported at 74 N.Y.2d 602, 541 N.Y.S.2d 985, 539 N.E.2d 1113)

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of May A.D. 1989

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-13 Mo. No. 263
Immuno, A.G.,
Appellant,
v.
J. Moor-Jankowski,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

ORDER DENYING MOTION FOR REARGUMENT

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of February A.D. 1990

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 86
Immuno, A.G.,
Appellant,
v.
J. Moor-Jankowski,
Respondent.

A motion for reargument in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

New York Court of Appeals

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IMMUNO A.G.,

Plaintiff-Appellant,

- against -

DR. JAN MOOR-JANKOWKSI,

Defendant-Appellee.

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TRANSCRIPT OF ORAL ARGUMENT

THE BAILIFF: (Claps 3 times) The Judges of the Court.

Hear ye, hear ye, hear ye. All persons having any business before this Court of Appeals, held in for the State of New York, may now draw near, give their attendance and they will be heard.

JUDGE WACHTLER: Immuno versus Moor-Jankowski?

THE BAILIFF: Ready in the Courtroom.

JUDGE WACHTLER: Mr. Fersko?

BY MR. FERSKO:

MR. FERSKO: Good afternoon. May it please the Court, my name is Raymond Fersko. I am counsel for Immuno AG, plaintiff-appellant in this proceeding. Judge Wachtler, I would like to reserve three minutes of my twenty for rebuttal, if I may?

JUDGE WACHTLER: Certainly, if you find it necessary.

MR. FERSKO: Thank you, your Honor.

The question before this Court is whether the statements are false assertions of fact or protected opinion.

The record shows that the statements are either assertions of fact known to be false, or mixed opinion, which is actionable under this court's decision in Silsdorf against Levine.

Shirley McGreal testified that Dr. Moor-Jankowski supplied all of the information for the libel letter respecting hepatitis.

Dr. Moor-Jankowski testified, when he was confronted with documents during the course of his deposition that showed he had released Non-A, Non-B exposed chimpanzees to breeders or animals dealers, that he could tell if they were infectious.

JUDGE KAYE: Mr. Fersko, what weight would you give to the context of these statements? And by that, I mean particularly, what weight would you give to the fact that these statements are contained in a letter to the editor.

MR. FERSKO: The law is replete with many

cases where letters to the editors had been held to be actionable. Obviously, the context of a letter to the editor, in an Op-Ed piece in the New York Times or in the general media would be considered more opinion than in a refereed scientific journal, such as we have here.

Dr. Moor-Jankowski testified, at his deposition, that everything in this Journal of Medical Primatology was refereed material, including the libel letter. Plus, he really vouched for the libel letter and the factual contents set forth in the libel letter with an editorial note bringing up to date the period from January of 1983 through the date of the editorial note of October 1983, and the time in which it was published in December of 1983, that the reader was given a full set of circumstance with respect to the content—it is factual content—set forth in this medical journal.

Indeed, he also gave Shirley McGreal a medical degree when, in fact, she had an Ed.D. from the School of Home Economics at the University of Cincinnati.

JUDGE KAYE: But this letter was quite plainly her expression of her view in a letter to the editor; was it not?

MR. FERSKO: With all due respect, your Honor, it was not her view; she testified that everything contained in the letter, with respect to hepatitis was given to her by Dr. Moor-Jankowski.

The core libel at bar was the statement that said you can not tell whether or not a chimpanzee exposed to Non-A, Non-B hepatitis is capable of carrying that disease to another chimpanzee. And from that core libel, all of the other libels set forth in

the letter to the editor are derived.

The next most important libel set forth was the fact that the letter to the editor said—

JUDGE HANCOCK: What is the libel in that last quoted statement? Is it dependent on an inference that humans could contract hepatitis? Is that the alleged libelous inference?

MR. FERSKO: Judge Hancock, my client is in the business of producing safe and efficacious plasma derived products and vaccines that are made from human matter. If those products aren't safe, people take them and they die. And for readers in a medical journal to think that they would engage in a scientifically—in a proposal, such as this, which would be so reckless and wanton that they would spread hepatitis throughout West Africa, because it holds them up, certainly, that, in and of itself, is a defamatory meaning and is libel per se. Even the Appellate Division determined that.

JUDGE HANCOCK: If that is the alleged libel, then I ask you, where does the paragraph say that?

MR. FERSKO: If you look in the contents of the libel letter—

JUDGE HANCOCK: Because it's—

MR. FERSKO: First of all, the headline says that this was a proposal, a project with the potential to spread Non-A, Non-B hepatitis in West Africa, and it goes on to state that you can not tell whether or not a chimpanzee exposed, in that paragraph numbered 1 on page 281 of the libel letter specifically says that

"there is no way to determine that an animal is definitely not a carrier of the disease."

That is a false statement. It was known by Dr. Moor-Jankowski to be false. Indeed, when his deposition was taken, when he was confronted with the evidence that he had released chimpanzees for four years prior to the time of the libel letter's publication, he admitted, under oath, that he can tell whether or not a chimpanzee is infectious with N-A, N-B hepatitis by the standard test, which everyone else who testified in this case also said that they follow.

And that test, quite simply, is inoculating the serum from chimpanzees that have been clear after a certain designated period of time, into another chimpanzee, waiting to see if that chimpanzee is clear and then, to determine whether or not that chimpanzee is susceptible, inoculating that chimpanzee with the N-A, N-B virus.

JUDGE WACHTLER: Mr. Fersko, were you ever sent this letter for comments?

MR. FERSKO: We were—we were not sent the exact letter that was published, but we were sent a letter quite similar to it, from Dr. Moor-Jankowski.

JUDGE WACHTLER: And what did you do about that?

MR. FERSKO: We wrote back to him and we said, put your hat on as a scientist,

Dr. Moor-Jankowski. Put your hat on as the Head of LEMSIP, and as to the other matters, we will consult our lawyers. Because as the Head of LEMSIP—

JUDGE WACHTLER: Did you ever tell him that the matters set forth in the letter were libelous, defamatory or any way inaccurate or incorrect?

MR. FERSKO: Indeed, the lawyers did tell him that, but we specifically said—we never dreamt that Dr. Moor-Jankowski would publish in a scientific journal a letter to—a statement saying that you cannot ascertain the infectiousness of a chimpanzee exposed to N-A, N-B hepatitis. And we said to him—he wrote a letter in the third person, he said, the editor thinks this is important, so Dr. Eibl of Immuno wrote back and said, well the editor should consult the Head of LEMSIP. The same person, Dr. Moor-Jankowski.

Everyone that has testified in this case with respect to N-A, N-B hepatitis, Dr. Prince, Dr. Eder of Immuno, who was the first one to testify with respect to it, all of the documents that were set forth, that are part of the record, all maintain that you can tell whether or not a chimp is infectious with N-A, N-B hepatitis.

JUDGE WACHTLER: If I could just take you back a moment—

MR. FERSKO: Certainly, your Honor.

JUDGE WACHTLER: What you're saying is that you apprised them of the fact that this was libelous, when you were sent this letter in advance of publication?

MR. FERSKO: When we were sent the letter, Dr. Eibl wrote back and said, consult yourself as to the scientific aspects, and as to the other aspects, our lawyers will contact you.

JUDGE WACHTLER: So you went no further than that as far as—

MR FERSKO: We asked him—the lawyers wrote to him. We were proceeding with caution, we had just finished two years of litigation with Dr. Moor-Jankowski, in order to take our chimpanzees back to LEMSIP, and during that litigation he tried to keep us from doing it, and he put Shirley McGreal and other animal rights people against us, and tried to keep them from exercising their first amendment rights against him, so that he could continue on with his own commercial endeavors.

JUDGE WACHTLER: Now, assuming that this was a product of mere negligence, in other words, that they weren't advised with specificity as to libelous content and that there was, again, negligence, but no more than that. Under Chapadeau, wouldn't they be able to escape ultimate liability?

MR FERSKO: That is correct, your Honor, and I think as a logical corollary to the Chapadeau case, that the readers of the Journal of Medical Primatology, or any refereed scientific journal, don't expect that their editors are going to engage in gross misconduct, and therefore, in a very narrow area, such as this type of a situation, the readers of a scientific journal should expect that their editor, or the authors writing there, will engage as reasonably prudent persons similarly situated.

JUDGE WACHTLER: So that you are saying mere negligence should be the test in instances such as this?

MR. FERSKO: Yes, just as 35 other States apply it as to the general media. I would not say

apply it to the general media, I think the Chapadeau standard is the appropriate standard. But I would say, in a situation such as this, with a refereed scientific journal, that there should be a high -- really a higher standard of conduct, because the readers are expecting it, that is what they are paying for when they buy the journal, and that–and that it would be appropriate. And that this Court has an opportunity now to fashion such a standard.

JUDGE BELLACOSA: Mr. Fersko, if the court were to accept your invitation, to have a separate rule for refereed scientific journals, whatever that may mean, how would those publications be identified and categorized for purposes of the application of such a rule?

MR. FERSKO: Journals that hold themselves out as refereed, that subject themselves to peer review–

JUDGE BELLACOSA: And everything that went into them, if they self-proclaimed that they were refereed scientific journals, everything that went into them, including letters to the editor, would, therefore, fall under this more relaxed rule.

MR. FERSKO: Not if the letters to the editor were not self-proclaimed to be refereed, but here, the defendant testified, at page A86 of the record, that every single thing in his journal was refereed, including the letter to the editor. Indeed, he said it was subject to peer review, and that he had shown it to two different scientists to review all of the underlying documents and the underlying facts, and the letter, and that was false testimony. He said that Dr. Goldsmith had looked at it. Dr. Goldsmith was dead. Dr. Rowan, who he said looked at it, testified that he

never saw the underlying documents and that he never saw the letter to the editor prior to the time.

JUDGE SIMONS: Really, an argument could be made that you don't need a lesser standard for refereed journals because they are self-policing in a sense. If they're not reliable, they're nothing. It's not like a magazine that's catering to the public curiosity, and so forth. It's a publication that deals exclusively with highly trained people and deals exclusively with scientific subjects.

MR. FERSKO: That's correct, Judge Simons, except that I think the public, that may be here in New York State, where 15% of the world's scientific publications are published; that, maybe, the public ought to be protected in some way from scientific misconduct, such as took place here.

We don't need this—

JUDGE SIMONS: Well, that's my point. The journals, such as this, are catering to a highly sophisticated audience.

MR. FERSKO: Well a highly sophisticated audience looked at this material, and what—you have a nuance in this case that is interesting as compared to most other opinion cases.

Because while it is a threshold determination that you must make, as to whether or not the material is fact or opinion, you have evidence in the record as to how the readers perceived the material.

And the readers here perceived the material as being factual. They thought that a medical doctor was writing, and that a medical doctor said that you cannot

determine whether or not a chimp exposed to N-A, N-B hepatitis is infectious.

And Dr. Prince, responding, said that in his competing facility in Liberia, he conducts the same test that Dr. Moor-Jankowski said that he conducts, and he responded to that fact, contained in the letter to the editor, and he also responded to the fact contained in the letter to the editor with respect to release. Just as Dr. Rowan did, following up.

And Dr. Moor-Jankowski, himself, said that he considered the material to be factual. That's found in the first page of the Supplemental Appendix, annexed to the respondent's brief. Similarly, there were—he wrote letters where he said that these were accusations, and in his initial drafts of the editorial note he said that they were allegations, and that Immuno was the incriminated party.

JUDGE KAYE: Mr. Fersko, without reaching any proposed higher standard for refereed scientific journals, I take it it's your position that, even if Chapadeau is the governing standard, that this standard has not been met here for a factual statement.

MR. FERSKO: Absolutely, your Honor.

I'd like, if I may, I see I just have four minutes left.

A couple very important points, the very telling evidence, that was ignored by the Appellate Division, is the fact that the World Health Organization was aware of Immuno's plans in Sierra Leone and their own internal memorandum, of October and November of 1983, specifically stated, that Immuno was not going to release chimpanzees pursuant to an explicit agree-

ment reached with the Government of Sierra Leone.

Dr. Moor-Jankowski testified that he was in constant communication with the World Health Organization, throughout that entire year. He saw documents that were official Sierra Leone documents that said that. He still went ahead and published it. The release was the conduit by which the hepatitis would be spread. And I suggest to you, that the Appellate Division strained to find the evidence against Immuno and ignored that. There is nothing in the record, in their decision at all, even respecting that. And the respondent has not even responded to that in their brief.

Also, I would like to point out that this is a summary judgment case. It has been asserted that this court should relax its standards for summary judgement in connection with—in order to give some added protection to libel defendants. I suggest that there is no basis, in either law or policy, for doing that based upon the decision of this court in Silsdorf, which referred to the actual malice standard as providing enough protection, and based upon the Supreme Court's recent decision, in Liberty Lobby and Calder v. Jones, saying that there are enough protections embodied in the substantive law of libel, that no special added procedural protections are necessary.

If there are not any more questions, I'll let Mr. Sugarman continue.

JUDGE WACHTLER: Very good. Thank you very much, Mr. Fersko.

MR. FERSKO: Thank you.

JUDGE WACHTLER: Mr. Sugarman?

BY MR. SUGARMAN:

MR. SUGARMAN: May it please the court, my name is Robert Sugarman. I represent Dr. Jan Moor-Jankowski.

I think we need to start about ten years ago, with this Courts admonition in Karaduman that, "We must not be reluctant to apply the ordinary rules governing summary judgement in libel cases, such as this, since," and I'm quoting the D.C. Circuit in Washington Post, "the threat of being put to the defense of a lawsuit may be as chilling as the exercise of first amendment—to the exercise of first amendment freedoms as fear of the outcome of a lawsuit itself."

The wisdom of that warning, your Honors, I think is vividly demonstrated in this case.

It's been pending for five years.

Dr. Moor-Jankowski, the sole remaining defendant, was deposed for fourteen days.

Dr. Shirley McGreal, the author of the letter, was deposed for four days.

There were four depositions taken in Austria, in defense of which Dr. Moor-Jankowski had to retain Austrian counsel.

There were depositions noticed in Sierra Leone, in connection with which Dr. Moor-Jankowski had to retain Sierra Leone counsel.

And all of this flowed from a decision that he made to publish a letter to the editor in a journal.

And before publishing that letter to the editor he gave Immuno the opportunity to reply, not once, but twice, an opportunity that was declined ostensibly because they needed the documents on which Dr. McGreal based her views, even though those documents were Immuno's own documents, as pointed out by the Appellate Division.

JUDGE BELLACOSA: Mr. Sugarman, excuse me for interrupting you, but you try to paint a very sympathetic picture, and I can understand why, in your advocacy, you would do that. But it could have been attended to with a very simple disclaimer, could it not? If all those procedures had been put into place preliminarily, why wasn't there a simple disclaimer? That would have reflected the responses and the concerns that your adversary would assert.

MR. SUGARMAN: There was, in the editor's note a mention that Immuno had been given the opportunity to reply. Had declined. And the letter from Immuno's lawyers was quoted, in which they said, in their view, Dr. McGreal's statements were not fair comment, and I think "fair comment" is an interesting phrase. It only underscores the view that is obvious from the letter, that it was a letter from an animal rights activist known to be such by the readers of this journal, a sophisticated—a small sophisticated group of people experienced in this are—

JUDGE BELLACOSA: Well, my point is that you assert then that that's a sufficient neutralization of the preliminary, or prefatory, material, which appears to give an imprimatur or an endorsement to the letter to the editor.

MR. SUGARMAN: I would read the editorial note as saying that these are the concerns seen by Dr.

McGreal, and that's what the editor's note said. They were seen by Dr. McGreal.

It basically refers back to the letter, itself, and gives, completely, the history of the publication, including the attempts to elicit a response from Immuno.

I don't understand how anybody could say now that they never dreamt, as Mr. Fersko says, that Dr. Moor-Jankowski would publish this letter, when twice, not once, but twice, he asked for and solicited a response from Immuno which never, never came.

JUDGE KAYE: Mr. Sugarman, does the fact that this is a letter to the editor from an animal rights activist make her statements, in and of themselves, opinion?

MR. SUGARMAN: In and of themselves, no. But that fact, if you get to the four-part test that this Court adopted in Steinhilber based on Judge Starr's opinion in Ollman, carries it a long way.

The context of the publication, both in terms of the statements in the context of the letter and the broader social context, certainly indicate, to a reader, that these are expressions of opinion from an individual, clearly, who has feelings and opinions in this area, and is supporting a cause.

I don't think there can be any more definite hallmarks of opinion than the language of this letter—

JUDGE WACHTLER: You say there's a heightened immunity to prosecution for libel if you happen to represent a group such as this, or speak for

a group such as this?

MR. SUGARMAN: I wouldn't term it a heightened protection, I would term it as definitely relevant in the context of the four-part test to determine whether—

JUDGE WACHTLER: So that if you represent an extremist group, we'll say, you have a right to say more extreme things about someone.

MR. SUGARMAN: No, I don't think I would term it that way. I think though, that in terms of the question that Judge Kaye asked is to whether it would be viewed as opinion, I think that when reading a letter from someone with a clear bias, written in the way that it was, it certainly indicates, to the reader, that this is an expression of opinion in the context of the letter itself, and in the broader social context.

JUDGE KAYE: Well, Mr. Sugarman—

MR. SUGARMAN: I wouldn't say it's any greater protection, but certainly, it should be no less.

JUDGE KAYE: What about the statement referred to by Mr. Fersko as the core libel. Do you maintain that that's an expression of opinion, when Dr. McGreal says there's no way to determine that an animal is definitely not a carrier of the disease?

MR. SUGARMAN: Well, I think that all you need do, in terms of that, is to look at the opinion of the Appellate Division in terms of how it dealt with what Mr. Fersko now claims is the core libel.

As an aside, I think if you read the briefs, the core libel was the change of plans, but now the change

of plans doesn't seem to be the core libel, the core libel is the lack of any tests, and, in the Appellate Division's opinion in commenting on the whole issue of whether or not there is this test, quoted Dr. Prince, a recognized authority in the area, who termed this procedure expensive, laborious and wasteful, and observed that it would involve the infection of healthy chimpanzees. Went on to say, "Under these circumstance, McGreal can hardly be faulted for not assuming that Immuno would necessarily perform the inoculation procedure on every one of the many chimps that intended to return to the wild."

So that it is not at all surprising that Dr. McGreal indeed said this, because there was general agreement that the only way you can determine whether a chimpanzee is a carrier is to go through this laborious, expensive procedure of inoculating hepatitis-free chimpanzees to determine whether they get the disease.

So in that regard, to the extent that there is a statement, it is obviously true, doesn't even have to be true. As the Court below held, the plaintiff in this case has the burden of proving falsity. And there certainly wasn't any evidence in the record as to the falsity of that statement.

I talked, somewhat, about the four-part test, and it seems to me that the key to this case is really in two areas. One: was it opinion, and under this Court's opinion in Steinhilber, I don't think there can be any doubt that this is a pure opinion case.

What this court said in Steinhilber is, a pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. That is exactly what we have in this case. The Court

then adopted the four part test in Ollman.

I talked, somewhat, about the context. If you go to the first two factors in Ollman, the imprecision of the language, whether it is capable of being true or false, you see statements dealing with motivating factors. Getting around restrictions. Cheapness of wild chimpanzees. Motivation, as this Court held in Rinaldi is clearly something that is not capable of being a proved true or false.

JUDGE HANCOCK: Could that apply, those two factors, apply, do you think, to the statement, "There is no way to determine that an animal is definitely not a carrier of the disease"? That's precise. And what is there about that that said it can't be proven true or false?

MR. SUGARMAN: Well, I think that there are—that may not be one of those statements, because. . . . But then you get to the second issue that is really before this Court, and that is the appropriateness and propriety of the Court granting summary judgment in a case like this when, as in this case, there are supporting factual statements which support the pure opinion. If that is one of the supporting factual statements, I think the Appellate Division was absolutely right, that the plaintiff, in this case, just did not satisfy the burden of coming forward with sufficient evidence under Anderson and Chapadeau and Hepps to prove that to be false.

I'd like to deal, for a minute, with the whole question, which occupies substantial portions of the appellant briefs, about the so-called change of plans argument; that Immuno had abandoned its original plan, and instead was to take fifty to sixty chimpanzees, in one year, to develop a breeding colony.

In the first place, the evidence taken as a whole shows that there was no such change in plans. In January, Dr. Eibl was quoted in the Austrian press as saying that a breeding facility had insurmountable difficulties that prevent a profitable breeding of these animals. And while, in April, Dr. Eder may have agreed that Immuno should follow the breeding colony procedure, it never did so, and in his deposition Dr. Eibl testified that Immuno continued to be committed to that original plan.

Finally, had such a change of plans actually taken place, Immuno could easily have set the record straight, as it was given the opportunity twice to do.

And even assuming that there was a change in plans, the omission of the reference to change of plans was not defamatory. As the Appellate Division pointed out, "Surely Immuno does not suggest that its very own plan, one which it apparently would have been happy to pursue, was so ill-conceived and so obviously pernicious in its methods and probable consequences that its accurate disclosure caused Immuno reputational injury."

And finally, even if there was a change in plans, and even if the failure to disclose it was defamatory, there is no evidence that Dr. Moor-Jankowski acted with actual malice, or grossly irresponsibly, in publishing the letter. Indeed the evidence is to the contrary. He believed that the breeding colony proposal couldn't be implemented. He had a Die Presse article in which Dr. Eibl was quoted as saying that the breeding colony proposal faced insurmountable difficulties. He gave Immuno the opportunity to reply, and testified that when they didn't reply, he had, certainly, no cause to believe that they had changed their plans. And Dr.

Prince shared his view that this breeding colony proposal was not feasible.

I conclude where I began, with this Court's admonition in Karaduman, that courts should not be reluctant to apply the ordinary rules of summary judgment to libel suits. That's what the Court in Anderson, Supreme Court in Anderson, said. The Appellate Division, in this case, did just that. It applied the ordinary rules of summary judgment to a libel suit.

It held that the plaintiff in this case had the burden of coming forward and proving falsity. It held that it did not do that. It followed the dictates of the Supreme Court of the United States in Bose and carefully, carefully reviewed this record.

If libel suits, such as this one, cannot be put to rest on summary judgment, the fear expressed by the D.C. Circuit and quoted by this Court in Karaduman, will remain a reality.

The exercise of first amendment freedoms will be chilled by the threat of being put to the defense of a lawsuit.

Your Honors, as I submit, that's an intolerable result and ought not to be countenanced.

Thank you.

JUDGE WACHTLER: Thank you very much, Mr. Sugarman. Mr. Fersko?

BY MR. FERSKO:

MR. FERSKO: Jus a couple of quick comments, if I may.

I submit that the libel is as of the time that the bullet is fired, and not the time the gun is shot.

He had a year to get it right. He saw six months prior to the time that the journal was published, that Immuno had entered into an agreement. That they were not going to release chimpanzees. That was the basis by which they would be spreading Non-A, Non-B hepatitis. Even Mr. Sugarman can't get away from that fact that that was a false fact. And he was out to get Immuno. There was a long history of common law malice probative of his actual malice and probative of his culpability in this case.

With respect to summary judgment, I think that if the issues of fact exist, and if the issues of fact persist after a searching analysis of the record, that the court should not be afraid to apply the ordinary rules of summary judgment. But this is a case where the ordinary rules of summary judgment require that this Court send the case back for a trial.

JUDGE WACHTLER: To you make a determination as to whether it was fact or opinion?

MR. FERSKO: No, I think it was certainly factual. I don't think that you have to do that. I think to send it back for a trial on his culpability.

JUDGE WACHTLER: What is the measure of culpability? What do you want to try here?

MR. FERSKO: His measure of culpability, in order to ascertain punitive damages, would have to be under the actual malice standard.

His measure of culpability for actual damages, and I would like to be able to have that instruction to the jury, should be that of a reasonable scientific editor acting under similar circumstances.

JUDGE BELLACOSA: So, you want us to apply ordinary summary judgment rules and extraordinary libel rules. Because that would be a different rule with respect to the refereed publications that you would want us to adopt.

MR. FERSKO: It would be a logical corollary, in my view, of the Chapadeau decision. Chapadeau says that we look to see if someone is acting in a grossly irresponsible manner as compared to other responsible persons disseminating and gathering news information.

I submit that Dr. Moor-Jankowski is in a different position than the editor of a supermarket tabloid. And when readers read, for instance, about a UFO in a supermarket tabloid, they have different expectations when they read about it in a NASA journal. And this is a different type of a journal.

Thank you.

THE COURT: Thank you very much, Mr. Fersko.

(End of tape.)

CERTIFICATE

I, ROBERT S. ORDMAN, a Notary Public of the State of New York, do hereby certify that I have caused to be transcribed a videotape containing the oral argument of the appeal in Immuno A.G. v. Moor-Jankowski; that I have compared the foregoing transcript with the soundtrack of said videotape; and that the same is a true and accurate transcript of said proceedings.

I am not related by blood or marriage to any of the parties or their respective counsel.

In witness whereof I have set my hand and seal at New York, New York, this 7th day of May, 1990.

s/Robert S. Ordman
Robert S. Ordman

EXCERPTS FROM DEPOSITION TRANSCRIPT OF DEFENDANT JAN MOOR-JANKOWSKI

(p. 543)

Q: In 1979, when the [National Institute of Health] animals were taken, were you able to ascertain which animals that had been exposed to N-A, N-B research were carriers?

A: Yes.

(pp. 593-94)

Q: Are you saying, Doctor, that when you said "healthy chimpanzees," are you saying that you can't determine if a chimpanzee is healthy after it has been exposed to N-A, N-B?

MR. BRESSLER: Objection.

A: As I defined it before, if an animal were exposed to Non-A, Non-B, I considered it to be a carrier, unless tests are done of the animals to determine it is not a carrier.

Q: What would those tests be?

A: Inoculating the serum of plasma of this animal into a negative animal and, if the negative animal doesn't become positive, and is then challenged with Non-A, Non-B positive, then I know that the first animal was negative.

THE EDITORIAL NOTE AND
LETTER TO THE EDITOR
AS THEY APPEARED IN THE
JOURNAL OF MEDICAL PRIMATOLOGY

Editorial Note

A Project With Potential to Spread Non-A, Non-B Hepatitis in West Africa

In January 1983, the Editors of the Journal of Medical Primatology received a letter from Dr. Shirley McGreal, Chairwoman of the International Primate Protection League, alerting the biomedical community to a new attempt to establish another chimpanzee research laboratory in Africa. This was seen by Dr. McGreal as a violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research, and as a way to avoid the Convention on International Trade in Endangered Species (CITES).

The Editors submitted Dr. McGreal's letter for "comments or reply" to IMMUNO AG in Vienna, Austria which had been mentioned as the company interested in establishing the laboratory. IMMUNO acknowledged the receipt of the letter on February 17, 1983, but provided no comments, referring the matter to their lawyers in New York. The lawyers requested that the Journal of Medical Primatology provide them with the documents on which Dr. McGreal's accusations were based; they termed the statements to be wholly inaccurate and reckless. They further stated (March 3rd, 1983, letter from Goldschmidt, Fredericks & Oshatz, New York): "We would also like to advise you that our review of Dr. McGreal's letter indicates that it is not a fair comment regarding our client's

activities, and should you proceed with publication, without giving us the opportunity for a meaningful response, we shall be compelled to take whatever actions we deem necessary to redress our client's rights."

The Editors advised the law firm that Dr. Shirley McGreal should be contacted directly for access to the original documents, and they extended the period for receiving the rebuttal to April 20, 1983. During that period no additional information was received from IMMUNO or from their lawyers, but in the meantime, the matter was discussed in the Austrian press, and Dr. McGreal feels that these newspaper articles confirmed the contents of her letter. The final text of Dr. Shirley McGreal's letter of March 23, 1983, reflects the discussion in the Austrian press which occurred after her initial letter of January 30th was submitted for publication and this final letter is printed below.

J. Moor-Jankowski
October 1983

A Project With Potential To Spread Non-A, Non-B Hepatitis In West Africa

The International Primate Protection League has learned with concern of proposals submitted by the IMMUNO AG Company of Austria to the Government of Sierra Leone, West Africa, regarding the company's plans to establish a chimpanzee research facility in Sierra Leone, West Africa.

According to a statement dated August 23, 1982 submitted to the Government of Sierra Leone by Klaus Bieber, Austrian Consul in Sierra Leone, the animals would be used in hepatitis non-A, non-B research and

testing of hepatitis B vaccine. The purpose of establishing the facility in Africa was stated to be "to avoid the problems involved with the importation of live chimpanzees." Presumably, these "problems" include national and international laws and treaties regarding the movement of live animals belonging to endangered species. The chimpanzee *Pan troglodytes* is listed in Appendix I of the Convention on International Trade in Endangered Species.

Besides getting round restrictions on the international movement of chimpanzees, cheapness of wild-caught chimpanzees appears to be a motivating factor for the IMMUNO Company. According to the Austrian newspaper *Presse* (February 3, 1983), Immuno official Johann Eibl stated that captive breeding of chimpanzees was not an economically viable proposition.

The proposed facility would procure 60-80 chimpanzees per year, to be obtained from the wild. However, according to Bieber's statement, "it must be emphasised [*sic*] that the research will not bring about a decimation of chimpanzees: on the contrary, their numbers would remain stable." Readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised at this statement. However, Bieber cheerfully explains the non-detriment theme by saying, "Because, after going through a research circle of about 3 years, the animals will be in perfect condition and ready for rehabilitation into the wild."

The International Primate Protection League is concerned over IMMUNO's plans on many grounds; to cite just a few of them:

1. Release of chimpanzee "veterans" of hepatitis

non-A non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease. Should release of carrier animals occur, hepatitis could well spread among wild chimpanzees over large parts of Africa. Thus chimpanzees could well become a reservoir for hepatitis just as bats are a reservoir for rabies. The result might be increased human persecution of chimpanzees.

2. Although chimpanzee rehabilitation has acquired a certain "chic," it is known that wild chimpanzees attack introduced newcomers. For this reason, chimpanzees in the Mount Asserik project in Senegal directed by Stella Brewer had to be recaptured and released on islands in the River Gambia with no resident chimpanzees. As yet, no permanent home has been located for these animals. The rehabilitation procedures take many years per animal and are extremely costly and hence not feasible on the scale that would be required to start 60-80 animals per year on rehabilitation. Assuming a 5-year training per animal, there could be up to 400 animals undergoing rehabilitation at any given time, at the cost of millions of dollars annually. It is questionable whether, in spite of the most dedicated efforts, any rehabilitated chimpanzees will become totally normal, since they are usually removed from the wild at 1-2 years of age and thus miss the most critical years of their social development.

3. Capture of wild chimpanzees for research is in clear violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research. Chimpanzees are listed in the Red Data Book of the International Union for the Conservation of Nature as "vulnerable." The WHO statement "strongly recommends" that endangered, vulnerable,

and rare species be considered for use in biomedical research projects only if they are obtained from *existing* [emphasis added] self-sustaining captive breeding colonies (i.e., captive-breeding all animals required to at least the F-2 generation).

4. Currently, there are over 1,000 chimpanzees in US laboratories as well as large numbers in the Netherlands, Poland, Liberia, etc. These animals should be enough to supply any legitimate requirements for chimpanzees.

The International Primate Protection League shares the scientific community's concern over hepatitis. However, we feel that a way can and must be found to solve this problem without recourse to the dwindling populations of wild chimpanzees. Therefore, we appreciate the opportunity to draw this situation to the attention of interested parties.

Shirley McGreal, MD
Chairwoman
International Primate Protection League
P.O. Draw X
Summerville, SC 29483

Appendix—102

LETTER TO THE EDITOR
FROM DR. ALFRED PRINCE
AS IT APPEARED IN THE
JOURNAL OF MEDICAL PRIMATOLOGY

Letter to the Editor

As one who is responsible for a colony of chimpanzees housed in West Africa, some of which have been exposed to non-A, non-B (NANB) viruses, I believe that it may be useful to comment on the recent letter by Dr. Shirley McGreal which was published in this journal (12:280-281, 1983).

First, I would agree that a plan to obtain 60-80 chimpanzees from the wild in Sierra Leone is unrealistic and would further endanger the existing already threatened wild populations. Wild chimpanzee populations in the region are dwindling, and capture of infants would inevitably result in death of mothers and other chimpanzees. Furthermore, Dr. McGreal is correct in stating that rehabilitation and release to the wild of 60-80 chimpanzees per year is unrealistic.

In our facility, Vilab II at the Liberian Institute of Biomedical Research, we have embarked on such a program. Animals are first released in groups of 10-20 on 10-20-acre islands. This cannot generally be done until animals are an average of 6-8 years of age. Wild-born animals, previously resocialized into large groups, adjust well to life on these islands. They rapidly learn to nest and to forage, it is then necessary to keep these groups on islands until they have formed a sufficiently cohesive group, and have become physically mature and strong enough to withstand the hostility of wild chimpanzees if these are met following release to the wild. We feel that this will require an

additional 3-5 years.

An additional factor that must be considered is, first, the fact that suitable islands for rehabilitation are relatively scarce, and these must be provisioned; and second, that suitable final release sites are also scarce. The latter must be in "protected habitats" ie, properly supervised National Parks, and must have low populations of wild chimpanzees.

Initially, the success of release programs must be monitored by wildlife biologists using telemetry. There is no question that a conscientious release program is arduous and expense.

The problem of releasing animals who carry non-A, non-B viruses is an important one. Our experience, and that of others, about 25-50% of animals exposed to live NANB viruses carry the agent for more than one year. It is not yet known how many will still be carriers for long periods of time, although some animals have been shown to harbor the virus for over 5 years. Generally animals that carry this virus will have abnormalities in levels of liver transaminases, as well as characteristic ultrastructural changes visible by electron microscopic examinations of liver biopsies.

We presently require that the above parameters must be completely normal for a period of 2 years before an animal can be considered for release. Subinoculation of serum from such animals has not so far revealed them to be infectious; however, more such tests need to be done. We plan eventually to place animals with continuing evidence of NANB infectious islands for long-term care.

It is not likely that chimpanzees will ever become a significant reservoir of NANB infection that could pose

a hazard for man. These viruses are poorly transmissible, requiring either intimate (sexual) contact or blood transfusion. Furthermore, NANB viruses are common in human populations throughout the world. About 3% of the U.S. voluntary blood donor population is estimated to carry these viruses.

It is my feeling that future studies on NANB hepatitis in chimpanzees should be as limited as possible in number and, further, should utilize already captive chimpanzees or their offspring.

Alfred M. Prince, M.D.
Lindsley F. Kimball Research Institute
of the New York Blood Center
New York, NY

No. 89-1760

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1989

IMMUNO A.G.,

Petitioner,

vs.

J. MOOR-JANKOWSKI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a case involving a state law libel cause of action, this Court should review the findings of fact of the state courts?

2. Whether this Court should review the state courts' application of their ordinary rules for summary judgment?

3. Whether it is permissible to consider that the statements at issue were contained in a letter to the editor as one factor in deciding whether they constituted opinion?

4. Whether this Court should review a decision of the highest court of a state when the decision was based independently on state constitutional grounds?

PARTIES TO THE PROCEEDING

Petitioner Immuno A.G. is a commercial corporation organized and existing under the laws of Austria, having its principal office in Vienna, Austria, and having affiliated companies in approximately 30 different countries. Immuno A.G. manufactures biologic products from human blood plasma. (Pet. App. 32)[1]

Respondent Dr. Jan Moor-Jankowski is a "universally acknowledged authority on the use of primates in biomedical research" (Pet. App. 32-33), a professor of medical research at the New York University Medical School, the Director of the New York University Medical School's Laboratory for Experimental Medicine and Surgery in Primates ("LEMSIP"), the Director of the World Health Organization Collaborating Center for Hematology of Primate Animals and editor-in-chief of the *Journal of Medical Primatology*. (Pet. App. 33) Dr. Moor-Jankowski testified that the *Journal of Medical Primatology* reports on the use of primate animals in biomedical experimentation.

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[1] Citations to petitioner's appendix will have the abbreviation "Pet. App.".

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, Section 28 of Article I of the New York State Constitution, and Section 3212 of the New York Civil Practice Law and Rules ("CPLR") are set forth in pertinent part in Respondent's Appendix. (Resp. App. 1)

STATEMENT OF THE CASE

The facts are stated in the opinion of the New York Appellate Division. (Pet. App. 32-38, 50-54, 59-61) The case involves the decision by Dr. Moor Jankowski to print in the *Journal of Medical Primatology* a letter to the editor by Shirley McGreal. (Pet. App. 97-101) Before printing the letter, Dr. Moor-Jankowski reviewed documents from Immuno A.G.'s files and articles from the respected Austrian newspaper *Die Presse* confirming the contents of the letter and twice wrote Immuno A.G. to comment and reply to the views expressed in the letter. Immuno A.G. refused, instead stating through counsel that the views in the letter were "wholly inaccurate and reckless" and threatening legal action if the letter were printed. Along with the letter, Dr. Moor-Jankowski published an Editorial Note in which he included the statements made by counsel for Immuno A.G.

On December 14, 1984, Immuno A.G. served its complaint alleging libel and *prima facie* tort against Dr. Moor-Jankowski (and others no longer in this case). Extensive discovery was conducted over a period of two years, including fourteen days of deposition of Dr. Moor-Jankowski. On September 5, 1986, Dr. Moor-Jankowski moved for summary judgment. The motion court denied the motion as to libel but granted it as to *prima facie* tort. (Pet. App. 15-30)

The Appellate Division-First Department, after a thorough review of the record, reversed and granted summary judgment dismissing the complaint. (Pet. App. 31-70)

The Appellate Division decision reflects three fundamental legal principles. First, the importance of the constitutional protection of opinion and the resulting importance of distinguishing opinion from fact. (Pet. App. 40-42) Second, the requirement that a libel plaintiff opposing a motion for summary judgment come forward with proof in evidentiary form sufficient to generate a triable issue as to the offending statement's falsity" and that "[i]f no such proof is offered, the defendant is entitled to prevail." (Pet. App. 42-46) Third, pointing out that "[t]he importance of summary adjudication in the context of libel litigation cannot be overemphasized" because of the chilling effect of such expensive suits on the exercise of First Amendment rights, the necessity to apply the ordinary rules governing summary judgment. (Pet. App. 46-47)

Employing these principles, the Appellate Division held the statements contained in the McGreal letter to be either constitutionally protected opinion or factual statements which Immuno A.G. had failed to show susceptible of being proven false and, indeed, that the record showed in most instances to be "demonstrably true."

With respect what Immuno A.G. claims to be "the factual premise for the core libel"—that "there is no way to determine that an animal is definitely not a carrier of the disease" (Pet. Br. 9)[2]—the Appellate Division stated:

> *It is quite clear that Dr. McGreal was correct in her observation that there is no way of definitely determining whether an animal is a non-A/non-B carrier. Dr. Alfred Prince, the discoverer of non-A/non-B hepatitis and widely regarded as the preeminent authority on that form of hepatitis, testified at his deposition that the carrier state in chimpanzees who have been infected with non-A/non-B hepatitis is quite common.* Dr. Prince stated that minimally 25 to 50% and possibly as high as 75 or

[2] Citations to petitioner's brief will have the abbreviation "Pet. Br."

even 100% of animals remain non-A/non-B carriers indefinitely after they are no longer actively diseased. *Dr. Prince expressly confirmed that, as Dr. McGreal had stated, there is no test to identify the viral agent which causes non-A/non-B hepatitis, and indeed Immuno's own Dr. Eder co-authored an article acknowledging that the virus lacks generally accepted serological and morphological markers* (4 Hematology Magazine 510 [1984]). *There is then no real issue as to the accuracy of the factual premise underlying McGreal's concern that undetected non-A/non-B carriers might be released.* Immuno urges, however, that although there is no test for the non-A/non-B virus, it is possible to prevent the release of infectious chimpanzees, thus removing any risk of the spread of non-A/non-B hepatitis. But, here again, Immuno's plan would seem to have been completely unrealistic, for *the test Immuno claims it would have performed to determine whether its former research subjects were still infectious was to inoculate a healthy animal with the blood of a research veteran and see whether the healthy chimp developed hepatitis symptoms. Dr. Prince termed this procedure "expensive," "laborious" and "wasteful," and observed that it would involve the infection of healthy chimpanzees. He noted that the procedure's many drawbacks made its use rare.* Under these circumstances, McGreal can hardly be faulted for not assuming that Immuno would necessarily perform the inoculation procedure on every one of the many chimps it intended to return to the wild. *Without any practical means of screening for non-A/non-B carriers, there was certainly some risk reasonably to be perceived in a rehabilitation scheme such as that proposed by Immuno.*

(Pet. App. 63-64; emphasis added.)

The New York Court of Appeals unanimously affirmed, holding that the publications at issue were opinion protected by the federal and state constitutions and thus not properly the sub-

ject of a libel suit and that the Appellate Division had applied the appropriate summary judgment standard. (Pet. App. 1-13)

With respect to the statements in the letter of a factual nature, the Court of Appeals observed that "the Appellate Division examined each statement meticulously, and concluded from the voluminous record not only that plaintiff had failed to adduce evidence of falsity but also that all such factual assertions were demonstrably true." (Pet. App. 4)

The Court of Appeals went on to consider, as a part of its analysis of whether the challenged statements were fact or opinion, "the context of the challenged remarks." (Pet. App. 7) In that regard, the court considered the fact that the statements at issue were contained in a letter to the editor. (Pet. App. 7-10)

Immuno A.G.'s motion to reargue was denied. (Pet. App. 72)

SUMMARY OF ARGUMENT

Immuno A.G.'s petition for certiorari should be denied. There is no conceivable reason for this Court, in a case of "pure opinion" based on stated facts, to review a factual determination made by the New York appellate courts in applying the state court summary judgment rule.

1. While replete with numerous misstatements of law and fact, *see* Rule 15.1, Rules of Supreme Court, and cloaked in a fallacious argument that a question of law involving "mixed opinion" is somehow presented here, Immuno A.G. asks this Court to do no more than review a factual determination of the New York Appellate Division which was adopted by the Court of Appeals. Such a review is not appropriate.

2. The New York appellate courts applied the ordinary rules of summary judgment as previously formulated under applicable New York statutes and decisions.

3. The New York appellate courts did not hold, as Immuno A.G. claims, that letters to the editor occupy a "defamation-free

zone." Rather, the courts below, in determining whether the complained of statements were facts or opinion, appropriately considered that the communication appeared in a letter to the editor.

4. The New York Court of Appeals independently relied upon the State Constitution as a ground for decision.

ARGUMENT: REASONS FOR DENYING CERTIORARI

I. Certiorari Is Not Warranted Because, While Arguing That There Is A Legal Issue Of "Mixed Opinion," Immuno A.G. Actually Asks This Court To Review The Findings Of Fact Of The Lower Courts.

A. Immuno A.G.'s Argument Fails To Defer Appropriately To The State Appellate Court Correct Review Of The Record.

Immuno A.G.'s whole argument on "mixed opinion," which itself is misconceived, *see* point B *infra*, rests upon the request that this Court overturn a factual determination of the New York appellate courts. That argument is contrary to law and the record.

Immuno A.G. is requesting that this Court independently review the record in a situation where deference to the factual determination of the New York appellate courts is legally appropriate, especially in view of the Appellate Division's meticulous review of the record.

Moreover, in urging this Court to revisit the record, Immuno A.G. distorts the letter and the record and, as pointed out above (pp. 2-3), ignores the reasoned analysis of the New York Appellate Division of the only statement in the letter about which Immuno A.G. complains—"that there is no way to determine that an animal is definitely not a carrier of the disease." (Pet. App. 63–64) In sum, the Appellate Division held that the statement that there was no way to determine definitely an animal was not a carrier of the disease was literally true because, as Dr. Prince (the discov-

erer of hepatitis non-A/non-B) had testified and as Immuno A.G.'s own Dr. Eder had written, there was no test to identify the hepatitis non-A/non-B viral agent; and the judgment in omitting reference to an expensive, impractical, wasteful and rarely used inoculation procedure to determine infectiousness could not be faulted.

B. Immuno A.G. Misapplies The "Mixed Opinion" Doctrine.

Immuno A.G.'s argument on "mixed opinion" is based on an erroneous legal premise. "Mixed opinion" occurs when the communication implies undisclosed defamatory facts which support the stated opinion, not, as here, where the facts on which the opinion was based were disclosed. This is a classic case of pure opinion. *Steinhilber* v. *Alphonse*, 68 N.Y.2d 283, 289-90, 501 N.E.2d, 550, 552-53, 508 N.Y.S.2d, 901, 903-09 (1986).[3] Indeed, this point was so clear that the Court of Appeals did not need to address it in this case.[4]

II. There Is No Need For This Court To Review The Application Of The New York Summary Judgment Rule.

Immuno A.G. also argues that the New York Court of Appeals has set libel plaintiffs an unconstitutional and impossible

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[3] Notably, *none* of the cases cited by Immuno A.G. for the "mixed opinion" category apply that doctrine. Most of the cases cited hold that what was involved was "pure opinion" and *not* "mixed opinion". *See Dunn* v. *Gannett New York Newsmagazine, Inc.*, 833 F.2d 446 (3d Cir. 1984); *Redco Corp.* v. *CBS, Inc.*, 758 F.2d 970 (3d Cir.); *cert denied*, 474 U.S. 843 (1985); *Goodrich* v. *Waterbury Republican-American*, 188 Conn. 107, 448 A.2d 1317 (1982). The other cases cited, *Cianci* v. *New Times Pub. Co.*, 639 F.2d 54 (2d Cir. 1980), and *Silsdorf* v. *Levine*, 59 N.Y.2d 8, 449 N.E.2d 716, 462 N.Y.S.2d 822, *cert. denied*, 464 U.S. 831 (1983), rely *not* on the "mixed opinion" category, but on the holding that accusations of criminal conduct are not constitutionally protected opinion.

[4] Immuno A.G. relies on its mistaken notion of the "mixed opinion" doctrine to argue that the Court should take this case as a companion to *Milkovich* v. *The Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 863 (Jan. 22, 1990) No. 89-645. Since there is no "mixed opinion" issue, there is no reason for the Court to review this case in connection with its review of *Milkovich*.

high standard for proving falsity before trial. While admitting that it has the burden of proving falsity, Immuno A.G. argues that the issue of falsity is one for trial and not summary judgment and that the New York appellate courts erroneously applied special procedural protections by granting summary judgment out of undue solicitude for the First Amendment. This argument misstates what the New York appellate courts did and is nothing more than a contrived complaint about appropriate pretrial adjudication under the New York summary judgment statute, CPLR 3212, consistent with the right to free speech and a free press under the United States and New York Constitutions.

The New York appellate courts did not sanction special procedural protections in libel cases, but rather noted that courts must not be reluctant to apply the ordinary rules of summary judgment in libel cases because of the "chilling effect" of such suits on the exercise of First Amendment rights. (Pet. App. 47, 12)

The courts below simply applied the ordinary but important standard for summary judgment in New York: that a party in opposing a properly made notion for summary judgment under CPLR 3212 cannot rest on the conclusory allegations of the complaint, but must come forward with competent evidence to demonstrate that triable issues exist. *See Zuckerman* v. *City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980); *Alvord & Swift* v. *Steward M. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82, 413 N.Y.S.2d 309, 311-312 (1978); *Freedman* v. *Chemical Constr. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Mallad Constr. Corp.* v. *County Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 344 N.Y.S.2d 925 (1973). Because Immuno A.G. had failed in meeting its burden of coming forward with proof in an evidentiary form sufficient to create a triable issue of falsity, Dr. Moor-Jankowski was entitled to summary judgment. There is no reason for this Court to review that finding.

III. The New York Court Of Appeals Appropriately Considered The Fact That The Communication At Issue Was A Letter To The Editor As Part Of Its Analysis Of The Context of The Communication.

Immuno A.G. also seeks this Court's review on the ground that "as a practical matter," the Court of Appeals ruled that a letter to the editor occupies a "defamation free zone" and cannot be the subject of a libel action. (Pet. App. 14)

The Court of Appeals did not hold that letters to the editor may never be the subject of libel suits. What the Court of Appeals (and the Appellate Division) did was appropriate: to articulate that courts, in determining whether to classify an expression as one of fact or opinion, should consider the context in which the statement is made and, in that regard, should take into account that letters to the editor are viewed as communicating the opinions of the author and provide an important vehicle for the expression of opinion by readers of the publication. Surely, it was unexceptional for the Court of Appeals to consider the publishing context of letters to the editor as an important factor in its analysis. *See, e.g., Karnell* v. *Campbell*, 206 N.J. Super. 81, 501 A.2d 1029 (N.J. Super. A.D. 1985) (suit over letter to the editor criticizing developer dismissed as opinion).

IV. An Independent State Ground of Decision Exists.

The Court of Appeals based its decision on the New York Constitution[5] as well as the Federal Constitution. (Pet. App. 5, 11) And, as the Court of Appeals has held, the citation to the New York Constitution by the Court of Appeals must be read as establishing an independent state ground. *See People* v. *Class*, 63 N.Y.2d 791 (1984), *rev'd*, 475 U.S. 106 (1986), *on remand*, 67 N.Y.2d 431 (1986), (after Supreme Court reversal on federal con-

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[5] Indeed, the New York Court of Appeals has held that the free speech and press guaranty in the New York Constitution provides greater protection than the First Amendment to the Federal Constitution. *O'Neill* v. *Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988).

stitutional grounds, the Court of Appeals on remand adhered to its original decision as a matter of state constitutional law, stating it would take a compelling or extraordinary showing to change the original state constitutional decision).

CONCLUSION

Respondent Dr. Jan Moor-Jankowski respectfully requests that this Court deny Immuno A.G.'s petition for a writ of certiorari.

Dated: New York, New York
June 8, 1990

Respectfully submitted,

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APPENDIX

RESPONDENT'S APPENDIX-1

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law.

Article I, Section 28 of the New York State Constitution provides in pertinent part:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . . .

Section 3212 of the New York Civil Practice Law and Rules ("CPLR") provides in pertinent part:

> A motion for summary judgment . . . shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party.

No. 89-1760

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IMMUNO, A.G.,

Petitioner,

vs.

JAN MOOR-JANKOWSKI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR
THE STATE OF NEW YORK

REPLY MEMORANDUM FOR THE PETITIONER

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Reply Memorandum for the Petitioner

This reply to Moor-Jankowski's Brief in Opposition is filed because Moor-Jankowski has, for the first time, argued that the Court of Appeals decided this case on state, not federal, grounds.

Moor-Jankowski has, until now, argued that the U.S. Constitution requires that he win his motion for summary judgment; only now has he discovered a preference for state sources of protection. The Court of Appeals focussed almost exclusively on the federal constitution. At most, the Court of Appeals casually mentioned New York's constitution twice, in passing. Appendix pp. 5, 11. Indeed, in the first passage cited, the Court of Appeals emphasized the *federal* sources of the fact/opinion distinction underlying its decision, citing *this* Court's decision in *Gertz v. Robert*

Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (which the Court of Appeals viewed as first elevating the fact/opinion dichotomy to federal constitutional levels). Appendix at 5.

Moor-Jankowski is not the first litigant to grasp at that particular straw, and this Court has reacted to such tactics by heavily restricting the circumstances under which it will find adequate independent state grounds. In *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), this Court held that a passing mention of state sources was not enough:

> "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. *Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believes that federal law required it to do so.* If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent

> grounds, we, of course, will not undertake to review the decision."

463 U.S. 1032, 1040-41 (emphasis supplied).

If the decision below was founded on adequate independent state grounds, the New York Court of Appeals would have said so. That is exactly what it did in *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y. 2d 521, 523 N.E. 2d 277, 528 N.Y.S. 2d 1 (1988), where it said:

> "Our decision is based on an adequate and independent ground under our State Constitution."

71 N.Y. 2d 524. Far from supporting Moor-Jankowski's contention, *O'Neill* shows that the New York Court of Appeals did *not* have state law anywhere near the forefront of its consciousness as it rendered the decision appealed from—that if state law played any part, it is nevertheless thoroughly "interwoven" with the United States Constitution and this Court's decisions interpreting that Constitution.

Moor-Jankowski also argues that this Court should not review the decision below because it decided factual issues under New York procedure. This new argument misconstrues the question posed by this petition. The question is not whether the Appellate Division, on which the Court of Appeals relied and Moor-Jankowski here relies for a statement of facts, got those facts wrong. Manifestly it did (which will come out on the appeal if certiorari is granted); but what Immuno wants this Court to review is whether, as the Appellate Division and the Court of Appeals insisted, the First Amendment to the U.S. Constitution *mandates* that a court determine, and not just identify, jury issues regarding truth or falsity prior to trial, where a published expression of opinion is based upon a published factual predicate, and there is evidence upon which the predicate could be found false.

The statement that Immuno proposes to conduct itself in a way which will spread Non-A/Non-B hepatitis (by releas-

ing rehabilitated chimpanzees to the wild—Appendix pp. 83, 99, 100) was premised on the factual statement that there is no test to determine whether a chimpanzee, having been exposed to the disease, is a carrier capable of infecting others. However, Moor-Jankowski knew such a test existed and was not unrealistic or impracticable, *because he used it himself.* (Appendix at 95; *see also* Appendix pp. 76-77, 88.)

This Court should grant certiorari to consider whether the First Amendment permits or requires a court to usurp the jury's function by finding a predicate statement to be true even though the court (in the same paragraph) recognizes that there is a basis for finding the predicate factual statement to be false. (Opp. Br. pp. 2-3.)[1]

Moor-Jankowski is simply wrong in denying that this is a mixed-opinion case. This case directly raises the question, what is the burden of proof of falsity of a factual assertion, where that assertion is the predicate for a defamatory opinion?

Immuno's burden to demonstrate falsity is of *federal* constitutional dimension. This Court so held in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986). That burden having originated with this Court, it is appropriate that this Court, and not the New York courts, set the precedent on what, before trial, that burden consists of.

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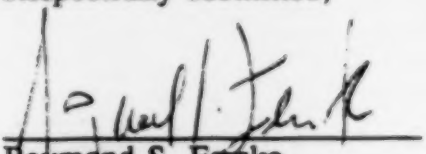
[1]Thus, while acknowledging that there was a test which does determine whether a chimpanzee is infectious, and that Immuno's proposal was to use it, the lower court anomalously found that "there is no way to determine that an animal is definitely not a carrier of the disease". . ."with potential to spread non-A non-B hepatitis in West Africa." Appendix pp. 100, 98.

Conclusion

For these reasons, and for those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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No. 89-1760 (4)

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

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No. 89-1760

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Supplemental Memorandum for the Petitioner

Milkovich v. Lorain Journal, No. 89-645 (June 21, 1990), leaves an important libel law issue unresolved. This Court has not defined the plaintiff's burden as to falsity imposed by *Philadelphia Newspapers v. Hepps*, 475 U.S. 323, 106 S. Ct. 1558, 89 L. Ed. 2d 1201 (1986), as that burden obtains on a pretrial motion. That is precisely the second question presented by Immuno's petition for certiorari, and it takes on a heightened importance and a more urgent need for resolution after this Court's decision in

Milkovich.[1] Instead of having to wait for the issue to percolate through the lower courts for years, this Court has the rare opportunity to settle this important libel issue of constitutional dimensions, now, when the question is so timely.[2]

By holding in *Milkovich* that no separate Constitutional protection applies to expressions of opinion when a reasonable factfinder could conclude that the statement implies assertions capable of being proved false, this Court has already answered two of the three questions presented by Immuno on its petition for certiorari.

By deciding *Milkovich* in the manner it did, this Court has removed a major device used to deprive libel plaintiffs of redress. Dismissal at the pretrial stage had become the norm. In the words of this Court:

> "We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment. *The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding*. . . We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false."

Milkovich v. Lorain Journal, No. 89-645 (June 21, 1990) (emphasis supplied). In *Milkovich*, the Court has implied that if a statement is capable of being proved false, and the

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[1]The list of Immuno's parent, subsidiary and affiliates is set forth in footnote 1 of Immuno's petition for certiorari.

[2]Sixteen years passed between the decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974), and *Milkovich*.

plaintiff can show evidence from which a jury could conclude it was false, it should be left to a jury to decide if the statement is indeed false.[3] In Immuno's case, the Appellate Division recognized that there was indeed a falsity issue, but (erroneously, especially in the light of *Milkovich*) felt compelled by the First Amendment to *dispose* of the issue adversely to Immuno, instead of simply *identifying* the issue. This is beyond the requirements of the constitutional protections embodied in the substantive law of libel adequately secured by *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny, culminating in the requirement of proving falsity as set forth in *Hepps*. Indeed, the Appellate Division's focus was on fault, not falsity; it felt constrained to defend Moor-Jankowski's falsehood as understandable. Appendix, pp. 64-65.[4] In the course of illuminating plaintiff's pre-trial burden under *Hepps*, this Court ought to reverse that transparently erroneous result.

Now the test for actionability is whether or not a statement, whether of fact or opinion, can be proven true or false. However, the law of libel is once more in flux. For instance, the *New York Times* commentary on *Milkovich*, the day after the decision, said that the case would mean more

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[3]Such a result is not only consistent with this Court's decisions in *Milkovich* and *Hepps*, but is also consistent with *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986), wherein this Court held that a plaintiff may survive a defendant's motion for summary judgment on a showing of evidence on which a jury *might* return a verdict in his favor. 477 U.S. at 257, 106 S. Ct. at 2514-15, 91 L.Ed.2d at 217.

[4]There were at least two levels of falsity to Moor-Jankowski's statements, as will be developed more fully on brief. In a nutshell, (1) Moor-Jankowski knew that infectiousness *could* be determined, and (2) he knew that chimpanzees were not going to be released in any event. As to the latter point, he ignored facts that came into his possession between the time he got the first draft of the libel letter, and the time of publication, which shows that Immuno had agreed with the Government of Sierra Leone not to release any chimpanzees into the wild. *See* Petition at 4.

libel cases would go to trial, and quoted one commentator to the effect that it "may restore disorder to an area of the law that had become fairly orderly and predictable." Greenhouse, *High Court Narrows Shield in Libel Law*, N.Y. Times, June 22, 1990, at A17. By deciding exactly what a plaintiff has to show at the pre-trial stage to carry his *Hepps* burden, this Court can immediately resolve that timely issue, and avoid an unedifying replay of the state and lower federal courts all trying to guess this Court's view of the matter.

Whether or not this Court wants to resolve the falsity issue now, the fact remains that the New York Court of Appeals' decision is wrong because that decision was founded on the "classic" opinion doctrine, enormously overemphasizing the overall context of the statements at issue in a Letter to the Editor. *See* Petition Appendix, pp. 4-12.

The New York appellate courts rejected the significance of the core issue concerning falsity presented by Immuno. Simply put, Moor-Jankowski stated that Immuno's project had the potential to spread hepatitis in West Africa because there was no way to determine whether a chimpanzee exposed to the disease was capable of infecting others. Petition Appendix, pp. 99-100. Moor-Jankowski knew that statement to be false, because his own laboratory employed a test that showed whether a chimpanzee was infectious prior to release for breeding and rehabilitation. *See* Petition Appendix at 95.

The Appellate Division recognized that the test existed, but found it to be expensive and inexplicably held that Moor-Jankowski's admissions did not raise a triable issue of fact as to falsity. Petition Appendix pp. 64-65. In so doing, that court injected itself into the role of factfinder, resolving an issue of falsity which should have been left for resolution by the jury.

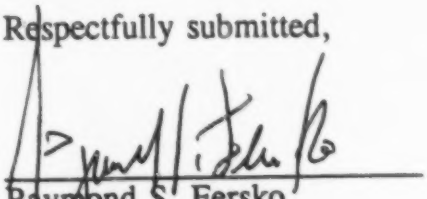
The *Milkovich* article was also tagged as opinion, and appeared in the sports pages, traditionally a forum for

energetic rhetoric. Indeed, as the *Milkovich* dissent makes clear, that article was much more unlikely to be taken seriously, given its context, than was Moor-Jankowski's authoritative libel in a refereed scientific journal. After *Milkovich*, to hold Moor-Jankowski's libel to be protected opinion is plainly reversible error. This Court should grant certiorari if only to reverse and remand for proceedings not inconsistent with *Milkovich*.

Conclusion

For these reasons, and for those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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